82-801

Office - Supreme Court, U.S.
FILED
NOV 12 1982
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HARKINS AND COMPANY, *et al.*,
Petitioners,

v.

JAMES W. ELLIOTT, JR., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIAM F. COCKRELL, JR.
Counsel of Record
MICHAEL G. KUSHNICK
ROSE, SCHMIDT, DIXON
& HASLEY
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 289-8300

EDMUND L. BRUNINI, JR.
JOHN E. MILNER
BRUNINI, GRANTHAM, GROWER
& HEWES
1400 First National Bank Bldg.
P.O. Drawer 119
Jackson, Mississippi 39205

KENNETH I. FRANKS
GLENN GATES TAYLOR
HARRY E. NEBLETT, JR.
HEIDELBERG, WOODLIFF
& FRANKS
Suite 1030, Capital Towers
Jackson, Mississippi 39201

Counsel for Petitioners

R. FRED HOSEY
HARKINS AND COMPANY
P.O. Box 1940
Alice, Texas 78332
Of Counsel

PANDICK PRESS, WASHINGTON—1801 N. OAK STREET, ARLINGTON, VA 22209—(703) 522-6000

QUESTIONS PRESENTED

1. Whether a state supreme court's failure to address in a written opinion Petitioners' constitutional claim of bias by a state trial court, which issue was first properly raised before the state supreme court, deprived Petitioners of their property and liberty without due process of law.

2. Whether the statement of a trial judge indicating that he was relying on his personal impressions of persons importantly involved in the relevant facts at issue, which opinions were based entirely on extrajudicial sources, reflected a bias which so tainted the trial court proceeding as to deprive Petitioners of their property without due process of law.

3. Whether, in view of the fact that the decision of the state courts is completely inconsistent with the controlling state substantive law precedent, the decision on the merits is so arbitrary and capricious as to constitute a denial of due process of law.

PARTIES TO THE PROCEEDING BELOW

Petitioners and appellants in *Harkins and Company, et al. v. James W. Elliott, Jr., et al.*, were St. Joe Petroleum (U.S.) Corporation; First Energy Corporation; First Mississippi Corporation; Amerada Hess Corporation;* Jerry E. Zoble; A. G. Holzapfel, Trustee for Mississippi-Alabama Employees Trust No. 2 and Harkins and Company, Employees Profit Sharing Plan No. 1; H. B. Harkins; Harry W. Hamilton; Harry W. Hamilton, Agent; James R. Lesch; Raymond M. Holliday; Ray Butler; Granville G. Tunstill; Warren Donaldson; H. D. Lee; Troy Anderson; John S. Dale; Harold A. Dale; David B. Dale; Irene Dale Polk; Katherine D. Little; James L. Dale; Alberta D. Baylis; Muncie Dale Smith; Ethlyn D. Turnage; Marilyn B. Michael; Ben G. Walden, Jr.; Bobbie W. Foster; M. R. Walden, Sr.; Madison S. Dale; Frances D. Pillow; Joseph Dale; Betty D. Touchstone; Bess S. Dale; Sarah Dale Polk; Ada Dale Gulledge; Mancie Dale Johnson; Robert M. Dale; Thomas D. Dale; Robin Dale Fuller; Richard S. Dale and Harkins and Company.

Respondents and appellees were Tullius Brady, Donald B. Pierce, E. L. Dunn, Paul D. Smith, C. E. Locklin, Jr., B. C. Griffith and James W. Elliott, Jr.

---

* The parent company of St. Joe Petroleum (U.S.) Corporation is Fluor Corporation; its affiliates are St. Joe Minerals Corporation and Coquina Oil Corporation. The parent company of First Energy Corporation is First Mississippi Corporation; its affiliates are Triad Chemical; First United, Inc.; Melamine Chemicals, Inc.; First Management Company; and F[illegible]t Delta Cement Corporation. Subsidiaries of Amerada Hess Corporation are: Amerada Hess Petrolmos Chile, S.A.; Amerada Hess Communications Corporation; Amerada Hess International Capital Corporation; Air Hanger, Inc.; Amerada Hess Corporation of Nevada; Esperanza Petroleum Corporation. Affiliates of Amerada Hess Corporation are: Wyatt, Inc.; Solar Gas, Inc.; Oasis Oil Company of Libya, Inc.; Bushehr Petroleum Company; Matco Tankers (U.K.) Ltd.; Anglomar Shipping Company, Ltd.; First United Shipping Corporation; Second United Shipping Corporation; Interocean Tanker Corporation; Grand Reunion Company; Atlas Marine Company; Artemis Marine Company, L.P.; Adriadne Company, L.P.; St. Croix Petrochemical Corporation; Conmer Terminals, Ltd.; D'ippolito Oil Company; Meadville Corporation; Reserve Terminal Corporation; Second Reserve Terminal Corporation; and South Jersey Terminal Corporation.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
1. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO HOLD THAT A STATE COURT BEFORE WHICH A DUE PROCESS CLAIM IS FIRST PROPERLY RAISED MUST ISSUE A WRITTEN OPINION RESPONDING TO THE CLAIM EVEN WHERE THE STATE LITIGATION INVOLVES PRIVATE PARTIES ONLY AND WAS INITIATED TO RESOLVE MATTERS OF STATE LAW ONLY	5
The Case Presented Satisfies The Court's Specific Requirements Of Its Flexible Due Process Concept Stated In *Mathews v. Eldridge*	7
An Explicit Holding By The Court That The Due Process Clause Requires A Written Decision In The Circumstances Presented Would Be Consistent With The Court's Precedent	8
2. THIS CASE PRESENTS ISSUES AS TO THE SCOPE OF THE DUE PROCESS CLAUSE WITH RESPECT TO IMPROPER BIAS OF A JUDGE IN STATE COURT PROCEEDINGS INVOLVING PRIVATE PARTIES ONLY AND INITIATED TO RESOLVE ISSUES OF STATE LAW ONLY	10
3. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO STATE HOW THE GUARANTEES OF THE DUE PROCESS CLAUSE PROHIBIT ISSUANCE OF A STATE COURT DECISION WHICH IS SO CLEARLY ERRONEOUS AS TO CONSTITUTE ARBITRARY AND CAPRICIOUS ACTION	15

Page

CONCLUSION 19
APPENDIX A 1a
APPENDIX B 2a
APPENDIX C 6a
APPENDIX D 7a

TABLE OF AUTHORITIES

	Page
CASES	
American Railway Exp. Co. v. Kentucky, 273 U.S. 269 (1927)	5,15,16
Anders v. California, 386 U.S. 738 (1967)	9
Arnett v. Kennedy, 416 U.S. 134 (1974)	10
Baltimore & Ohio R.R. Co. v. United States, 279 U.S. 781 (1929)	9
Berger v. United States, 255 U.S. 22 (1921)	11,14
Board of Regents v. Roth, 408 U.S. 564 (1972)	6
Brock v. North Carolina, 344 U.S. 424 (1953)	6
Bryant v. Zimmerman, 278 U.S. 63 (1928)	4
Columbus & Greenville Ry. v. City of Greenwood, 390 So.2d 588 (Miss. 1980)	16
Dunn v. Stratton, 133 So. 140 (Miss. 1931)	17
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	6
Goldberg v. Kelly, 397 U.S. 254 (1970)	6
In re International Business Machines Corp., 618 F.2d 923 (2d Cir. 1980)	13
Leighton v. One William Street Fund, Inc., 343 F.2d 565 (2d Cir. 1965)	8
Mathews v. Eldridge, 424 U.S. 319 (1976)	7
Mayberry v. Pennsylvania, 400 U.S. 455 (1971)	10,11
Mississippi Cent. R.R. Co. v. Ratcliff, 59 So.2d 311 (Miss. 1952)	17
NAACP v. Alabama, 377 U.S. 288 (1964)	6
Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979)	11
Ouber v. Campbell, 202 So.2d 638 (Miss. 1967)	17

	Page
Parratt v. Taylor, 451 U.S. 527 (1981)	10
Pennoyer v. Neff, 95 U.S. 714 (1878)	5,15
Postal Telegraph-Cable Co. v. City of Newport, 247 U.S. 464 (1918)	15
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	4
Pub. Serv. Comm'n v. Wisconsin Tel. Co., 289 U.S. 67 (1933)	9
Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980)	11-14
Roe v. Wade, 410 U.S. 113 (1973)	16
St. Regis Pulp & Paper Corp. v. Floyd, 238 So.2d 740 (Miss. 1970)	17
Sumner v. Mata, 449 U.S. 539 (1981)	9
Tracy v. Ginzberg, 205 U.S. 170 (1907)	15
Tumey v. Ohio, 273 U.S. 510 (1927)	10
Turner v. Miller, 276 So.2d 690 (Miss. 1973)	17
United States v. Forness, 125 F.2d 928 (2d Cir. 1942), *cert. denied*, 316 U.S. 694 (1942)	8
United States v. Grinnell Corp., 384 U.S. 563 (1966)	14
United States v. Sciuto, 531 F.2d 842 (7th Cir. 1976)	13
United States v. Thompson, 483 F.2d 527 (3d Cir. 1973)	11
Ward v. Village of Monroeville, 409 U.S. 57 (1972)	11
Watson v. Kenlick Coal Co., 498 F.2d 1183 (6th Cir. 1974), *cert. denied*, 422 U.S. 1012 (1975)	16
Williamson v. Lee Optical Co., 348 U.S. 483 (1955)	16
Wood v. Strickland, 420 U.S. 308 (1975)	9
CONSTITUTION, STATUTES AND REGULATIONS	
U.S. Constitution, Fourteenth Amendment, Section 1	*passim*
28 U.S.C. § 144 (1964)	13

	Page
28 U.S.C. § 455 (1982)	13
28 U.S.C. § 1257(3) (1964 & 1982)	2
28 U.S.C. § 2254(d) (1976)	9
Miss. Code §§ 11-51-1 *et seq.* (1972)	4
OTHER AUTHORITIES	
2B W. Barron & A. Holtzoff, *Federal Practice and Procedure* (Rules ed. 1961)	8
W. Ethridge, Jr., *The After-Acquired Property Doctrine and Its Application in Mississippi*, 17 Miss.L.J. 153 (1945)	17
5A J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* (2d ed. 1982)	8
L. Tribe, *American Constitutional Law* (1978)	5
PROCEEDINGS BELOW	
Elliott, et al. v. Harkins and Company, et al., No. 6573 (Ch. Ct., Jefferson Davis County, Miss., Jan. 7, 1981)	2
Harkins and Company, et al. v. Elliott, et al., No. 53,095 (Miss. Sup. Ct., Mar. 17, 1982), *reh'g denied*, June 30, 1982	2,4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HARKINS AND COMPANY, *et al.*,
Petitioners,

v.

JAMES W. ELLIOTT, JR., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

OPINION BELOW

The Supreme Court of Mississippi ("State Supreme Court") on March 17, 1982 affirmed, without opinion, a January 7, 1981 final decree of the Chancery Court of Jefferson Davis County, Mississippi ("Trial Court"). *See* Appendix A at 1a. (The January 7, 1981 final decree of the Trial Court appears in Appendix B at 2a.) On June 30, 1982, the State Supreme Court denied a timely petition for rehearing *en banc*. *See* Appendix C at 6a.

JURISDICTION

Following the State Supreme Court's June 30, 1982 denial of the petition for rehearing *en banc* of its March 17, 1982 decision, a timely application for an extension of time to file this Petition by November 12, 1982 was granted by this Court on September 15, 1982.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The controlling constitutional provision presented is the Constitution of the United States, fourteenth amendment, section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 8, 1981, the Trial Court heard the case of *James W. Elliott, Jr., et al. v. Harkins and Company, et al.* in which James W. Elliott, Jr. ("Elliott") brought an action to confirm and quiet title to an undivided oil, gas, and mineral interest in a 320-acre, gas-producing tract of land located in Jefferson Davis County, Mississippi. The value of the oil, gas and mineral interests at issue may exceed five million dollars. Brief in Support of Appellants' Petition for Rehearing at 3, *Harkins and Company, et al. v. Elliott, et al.*, No. 53,095 (Miss. Sup. Ct., Mar. 17, 1982), *reh'g denied*, June 30, 1982.

At trial, the factual inquiry focused on the underlying deed at issue, a Mineral Right and Royalty Transfer Deed executed on July 5, 1944 ("the Deed") by Elliott's predecessor-in-interest (B.C. Griffith, the grantor) to Harkins and Company's ("Harkins'") predecessor-in-interest (Robert B. Dale, the grantee). The Deed contained a clause providing that "this instrument is to convey to grantee all of grantor's mineral rights

in and to above described land" (hereinafter "all rights clause") and a granting clause indicating that Griffith was conveying to Robert B. Dale a 9/32's interest. However, Griffith possessed only a 4.5/32's interest on the date that the Deed was executed, although less than a year thereafter, he acquired another 4.5/32's interest. At trial, Elliott contended that Griffith's after-acquired interest had not passed under the Deed. After all evidence and arguments had been presented to the Trial Court, but immediately before that court stated its findings of fact and conclusions of law, the Chancellor ("Trial Judge") made the following statement (hereinafter "Statement of Bias"):

> I knew both B.C. Griffith and Robert Dale, they weren't anybody's fools, they were good businessmen and knowledgeable about the oil business and would not have put something in the instrument without some reason, unless it meant something.

Bill of Exceptions, Appendix D at 7a.

It is clear from the context of the transcript of the Trial Court hearing that in making the statement "put something in the instrument" the Trial Judge was referring to the all rights clause.

The record makes obvious that, based on the Trial Judge's personal opinions of Messrs. Griffith and Dale, personal opinions certainly based on extrajudicial sources, involving impressions apparently formed decades ago, he concluded that they had a reason for including the all rights clause in the Deed, *i.e.*, that the clause was not inadvertently included. Having reached that threshold determination based on extrajudicial "evidence," the Trial Judge then concluded (illogically) that the inclusion of the all rights clause limited the conveyance to Griffith's actual 4.5/32's interest owned on the date of the Deed, and that consequently the after-acquired title doctrine (under which a subsequently acquired interest would be deemed to have been conveyed on the date of execution of the deed being construed) did not apply to the Deed, and Griffith's after-acquired interest did not pass.

The Trial Court issued a written final decree on January 7, 1981. On January 16, 1981, Harkins, for the purpose of preserving for the record the fact that the Statement of Bias had been made by the Trial Judge (the Statement of Bias was made during an interval when the court reporter did not record the proceedings), filed a timely Bill of Exceptions which was signed by the Trial Judge who thereby acknowledged the accuracy of the Statement of Bias as set forth in the Bill of Exceptions. *See* Appendix D at 7a.

Harkins appealed the Trial Court decision to the State Supreme Court[1] on July 10, 1981, in which appeal Harkins, *inter alia,* raised the constitutional issues[2] that the Trial Judge's statement concerning his personal knowledge and personal opinions of B.C. Griffith and Robert B. Dale (i) represented a consideration of facts not in evidence, (ii) substantially colored the Trial Judge's interpretation of the Deed and (iii) constituted reversible error. Brief for Appellants at 23-25, *Harkins, supra.* The State Supreme Court, on March 17, 1982, affirmed the final decree of the Trial Court without rendering a written opinion. On April 6, 1982, Harkins filed a petition for rehearing in the State Supreme Court, raising the constitutional issues of (i) the Trial Judge's bias and his reliance on personal opinion based on extrajudicial material as to the merits of the case and (ii) the failure of the State Supreme Court even to address the bias issue in a written opinion. The State Supreme Court denied the petition for rehearing on June 30, 1982, again without rendering an opinion.

---

[1] In Mississippi, appeal from Chancery Court is made, as a matter of right, directly to the Mississippi Supreme Court, which may not refuse to hear an appeal. Miss. Code §§ 11-51-1 *et seq.* (1972).

[2] That Harkins' constitutional claims were adequately raised below is demonstrated by application to the facts of the Court's admonition that "[n]o particular form of words or phrases is essential but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time" in order to raise a federal claim. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928) quoted in PruneYard Shopping Center v. Robins, 447 U.S. 74, 85, n. 9 (1980).

REASONS FOR GRANTING THE WRIT

The legal issues raised by this Petition are unique and present this Court with the opportunity to address important issues, national in scope, bearing upon the relationship of the federal courts to state courts and upon how far the Constitution requires states to proceed in allowing meaningful access to the courts. *See,* L. Tribe, *American Constitutional Law,* § 10-18 (1978). That is, the Court is presented with the opportunity to articulate explicitly the scope of the Constitution's due process clause in circumstances where litigation has been initiated in state court on issues solely of state law involving entirely private parties. More specifically, as the discussion below demonstrates, this Court (i) has never addressed whether the due process clause is violated where a state court before which a constitutional claim is first properly raised fails to address that claim in a written opinion, (ii) has not recently defined the scope of the due process clause with respect to the particular judicial bias presented in this case, or (iii) affirmed or elaborated the proposition last stated by this Court over half a century ago that decisions of state courts on matters of state law should not be disturbed "unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.'" *American Railway Exp. Co. v. Kentucky,* 273 U.S. 269, 273 (1927) *quoting Pennoyer v. Neff,* 95 U.S. 714, 733 (1878).

1. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO HOLD THAT A STATE COURT BEFORE WHICH A DUE PROCESS CLAIM IS FIRST PROPERLY RAISED MUST ISSUE A WRITTEN OPINION RESPONDING TO THE CLAIM EVEN WHERE THE STATE LITIGATION INVOLVES PRIVATE PARTIES ONLY AND WAS INITIATED TO RESOLVE MATTERS OF STATE LAW ONLY.

This Court has never explicitly held whether, in a proceeding involving entirely private parties, state civil law, and state

judicial action, the due process clause requires the state court before which an issue is first properly raised to render a written opinion on the merits of the claim, particularly in circumstances where the highest state court is the court before which the issue is first properly raised and the due process claim arises out of the action of the trial court.

Before considering specific statements by the Court relevant to the importance of a court issuing a written opinion, it should first be noted that the case presented satisfies the threshold requirements of the fourteenth amendment. The fourteenth amendment commands, in pertinent part, that "[n]o *State* shall . . . *deprive* any *person* of *life, liberty* or *property,* without *due process* of law" (emphasis added). Applying these requirements in the circumstances presented, it is clear that (i) a state has deprived a person of property and liberty because action by a state court is "state action" for purposes of the due process clause of the fourteenth amendment, *see, e.g., NAACP v. Alabama,* 377 U.S. 288 (1964); (ii) the fourteenth amendment's protection of property extends to encompass contract and mineral rights, *see, e.g., Board of Regents v. Roth,* 408 U.S. 564 (1972); and (iii) corporations are persons within the meaning of the fourteenth amendment, *see, e.g., First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

With respect to the "due process" requirement, this Court has stated frequently that the concept of due process is not a hard and fast rule but instead is flexible and applied according to the circumstances of each case (as, for example, to minimize error in state decision making). *See Brock v. North Carolina,* 344 U.S. 424 (1953). Recent decisions of this Court have stressed that the amount and quality of due process requirements will vary with the importance of the interest to be protected. *See, e.g., Goldberg v. Kelly,* 397 U.S. 254 (1970).

The Case Presented Satisfies The Court's Specific Requirements Of Its Flexible Due Process Concept Stated In *Mathews v. Eldridge*.

The Court has more specifically stated the requirements of its flexible due process concept in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976):

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the *private interest* that will be affected by the official action; second, the *risk of an erroneous deprivation* of such interest *through the procedures used*, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the *Government's interest, including the function* involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citations omitted.]

Id. (Emphasis added.)

Applying the first criterion stated in *Mathews* to the facts presented, the private interest at stake in this case is significant because, if the decision below is allowed to stand, Harkins will be deprived of the right to receive royalty income very possibly exceeding five million dollars and the right to receive a fair hearing in order to demonstrate the right to that income.

Applying the second criterion, there is a risk of an erroneous deprivation where, as here, a state's highest court, which must hear an appeal and before which a constitutional claim is first properly raised, fails to state its reasons for denial of that claim. Certainly, the requirement of a written statement of the legal and factual bases of a decision forces the decision maker to consider more carefully its decision, and thereby acts

as a deterrent to ill-considered, arbitrary and capricious decisions. As Judge Frank of the United States Court of Appeals for the Second Circuit stated:

> For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.

United States v. Forness, 125 F.2d 928, 942 (2d Cir.) *cert. denied,* 316 U.S. 694 (1942). Other reasons supporting the importance of such a written statement are that such a statement aids the appellate court by affording it a clear understanding of the basis of decision of the lower court and makes definite what is decided in the case in order to enable the application of *res judicata* and estoppel principles to subsequent decisions. *See Leighton v. One William Street Fund, Inc.,* 343 F.2d 565, 567 (2d Cir. 1965); 2B W. Barron & A. Holtzoff, *Federal Practice and Procedure* § 1121 (Rules ed. 1961); 5A J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 52.06 (2d ed. 1982). Consequently, the requirement of a written decision is a valuable safeguard.

Finally, the additional fiscal and administrative burden that would be required for a court to issue a written opinion would not be great.

An Explicit Holding By The Court That The Due Process Clause Requires A Written Decision In The Circumstances Presented Would Be Consistent With The Court's Precedent.

It is important that this Court take this occasion to state explicitly that the failure of a court, whether it be federal or state, before which a constitutional claim is first properly raised, to issue a written determination in response to that claim constitutes a denial of due process. A review of these cases indicates that although the Court has never made such an explicit statement, nevertheless such a statement would be

entirely consistent with the statements which the Court has made. To elaborate, those precedents indicate that whether the issuance of a written determination by a court is mandatory has depended on the importance of the issue raised. That is, the Court has stated that a statement of the factual and legal basis of a decision is "always desirable," *Pub. Serv. Comm'n v. Wisconsin Tel. Co.*, 289 U.S. 67, 69 (1933) "as an aid to litigants and to this Court," *id.*, but has implied that it is not mandatory that such a written statement be issued in cases other than those presenting circumstances where (i) state law or state officials are enjoined, *id.* at 70, (ii) "questions were important, and the amounts involved were large," *Baltimore & Ohio R.R. Co. v. United States*, 279 U.S. 781, 787 (1929), or (iii) issues of constitutional due process are presented, *see Wood v. Strickland*, 420 U.S. 308, 327 (1975); *Anders v. California*, 386 U.S. 738 (1967). Most recently, the Court has indicated that where the claim is other than frivolous or totally without merit, a written determination should be issued. *See Sumner v. Mata*, 449 U.S. 539, 548 (1981) (discussing requirement of 28 U.S.C. § 2254(d) that a state court render a written opinion after a hearing on the merits of a factual issue in a federal *habeas corpus* proceeding instituted by a state prisoner). Application to the facts presented of these statements by the Court requires the conclusion that the question presented (whether the bias of the Trial Judge deprived Harkins of due process) is certainly important, not frivolous or totally without merit, as it presents an issue of constitutional due process and the amounts involved—in excess of five million dollars—are certainly large.

Although the requirements for a written determination expressed by the Court in its precedents are clearly met in the facts presented, there nevertheless is a need for the Court to articulate that the due process clause requires a written determination in the circumstances presented in view of the facts that (i) the Court has never clearly stated whether the Constitution may form the basis of requiring such a written determination, (ii) federal statutes formed the basis of the requirement of a written decision in certain of the precedents cited above and (iii) those precedential cases arguably contain other factual

circumstances possibly distinguishing them from the case presented. Accordingly, the Court should settle an unsettled point of law involving the relationship of the federal and state court systems and, consistent with its recent precedent, *see e.g., Parratt v. Taylor,* 451 U.S. 527 (1981), articulate again the limits of intervention by federal courts in state proceedings. The Court should articulate clearly that, although certainly state courts should be permitted broad discretion with respect to their procedures and policies, nevertheless where a federal constitutional claim is first properly presented to a state court, that court, particularly if it is the highest state court, is required by the due process clause to address that claim in a written determination.

2. THIS CASE PRESENTS ISSUES AS TO THE SCOPE OF THE DUE PROCESS CLAUSE WITH RESPECT TO IMPROPER BIAS OF A JUDGE IN STATE COURT PROCEEDINGS INVOLVING PRIVATE PARTIES ONLY AND INITIATED TO RESOLVE ISSUES OF STATE LAW ONLY.

The Court has stated that "the right to an impartial decision maker is required by due process" in every case. *Arnett v. Kennedy,* 416 U.S. 134, 197 (1974) (White, J., concurring in part, dissenting in part). *Accord, Mayberry v. Pennsylvania,* 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("appearance of even handed justice ... is at the core of due process").

Accordingly, it is not surprising to note that allegations of judicial bias have been addressed in a large number of federal court decisions. Federal courts have clearly held that certain "types" of bias are impermissible. However, neither this Court nor other federal courts have clearly articulated how to respond to cases such as the instant one involving particular expressions of bias which do not fit within those bias "types" frequently reviewed.[3]

---

[3] Those "types" of bias frequently considered by federal courts include: (i) bias reflecting personal financial interest, *e.g.,* Tumey v. Ohio, 273 U.S. 510 (1927); (ii) bias reflecting financial interest of a group for which the

(footnote continued)

The very facts that (i) there have been an infrequent number of cases where bias of a "type" similar to that demonstrated by the Trial Judge has occurred and (ii) the Court has never addressed bias of the type presented in a state court proceeding involving only private parties and initiated to resolve only issues of state law, makes it important that the Court take the opportunity presented by this case to articulate the scope of the due process clause in such situations.

Of course, in determining whether to grant a petition for writ of certiorari, the Court must also consider the merits of the case. In that connection, it is relevant to note that in those few cases involving statements of bias most analogous to that demonstrated by the Trial Judge, federal courts have reversed the decision of the biased judge and any subsequent affirming appellate court decision.[4] For example, in *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980), the United States Court of Appeals for the Sixth Circuit held that a trial judge in a sex discrimination suit had a duty to recuse himself on the basis of a single statement by the judge. There is a remarkable similarity between the statement of the trial judge in *Roberts* ("I know Mr. Graves, and he is an honorable man and I know he would never intentionally discriminate against anybody," 625 F.2d at

---

(footnote continues)

decision maker is officially responsible, *e.g.*, Ward v. Village of Monroeville, 409 U.S. 57 (1972); (iii) bias of a decision maker who has been the target of personal abuse or criticism by a party coming before him, *e.g.*, Mayberry v. Pennsylvania, *supra;* (iv) bias of a decision maker who uttered extreme and hostile comments to parties, *e.g.*, Nicodemus v. Chrysler Corp., 596 F.2d 152, 155 (6th Cir. 1979), particularly when the hostility appears to have been directed against an ethnic group, *e.g.*, Berger v. United States, 255 U.S. 22 (1921), or against a race, *e.g.*, United States v. Thompson, 483 F.2d 527 (3d Cir. 1973). It may be concluded that the bias of the Trial Judge in this case is not properly included in any of those "types."

[4] This Court has addressed the significance of subsequent affirming appellate review as follows:

> The remedy by appeal is inadequate. It comes after the trial, and if prejudice exist, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

Berger v. United States, 255 U.S. 22, 36 (1921).

127) and the statement of bias by the Trial Judge in the circumstances of this case ("I knew both B.C. Griffith and Robert Dale, they weren't anybody's fools, they were good businessmen and knowledgeable about the oil business and would not have put something in the instrument without some reason, unless it meant something.").[5] That is, in both cases the trial judge (1) indicated his personal knowledge, which was based on extrajudicial contacts, of a person or persons whose actions and intentions were crucial to the point of law in litigation, (2) stated a conclusion about a characteristic or characteristics of that person or those persons which the trial judge concluded was most relevant to the point of law in litigation, and (3) then concluded that the person or persons would not have taken an action forming the key factual dispute of the case.

One cannot properly distinguish the statements of bias in *Roberts* and in this case based on the logic (illogic) of the conclusions of the Trial Judge that the particular characteristics of Messrs. Griffith and Dale were relevant to the point of law in litigation — because it is not the logic (illogic) of the Trial Judge's conclusion which is relevant. What is important is that the Trial Judge's bias importantly influenced his decision on the crucial issue before him. (The timing of the Trial Judge's Statement of Bias, coming immediately before his ruling, and the fact that he ignored long-established precepts of deed construction in his ruling (*see* discussion at pp. 15-18, *infra*) clearly demonstrate that the Trial Judge's decision was primarily based on his biased opinion of Messrs. Griffith and Dale derived from extrajudicial contacts with those men decades ago.) Consequently, it does not diminish the impermissible nature of the Trial Judge's Statement of Bias in this case for

[5] In *Roberts*, as in the instant case, there was no dispute that the remark was made. *See* 625 F.2d at 127.

Harkins to acknowledge that the Trial Judge's conclusion of law, which was importantly based on his Statement of Bias, is illogical.[6]

Also, *Roberts* and the instant case may not be properly distinguished by virtue of the fact that in *Roberts* the United States Court of Appeals for the Sixth Circuit applied a federal statute (28 U.S.C. §§ 144, 455) requiring a federal trial judge to recuse himself where he demonstrates bias or prejudice, whereas in this case the Constitution's due process clause forms the basis of the contention of improper judicial bias. That is, other courts have consistently stated that such federal statute was enacted to protect the constitutional guarantee of a fair trial. *See, e.g., In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980); *United States v. Sciuto*, 531 F.2d 842, 845 (7th Cir. 1976) ("The right to a tribunal free from bias or prejudice is based, not on Section 144 [28 U.S.C. § 144], but on the Due Process Clause."). Consequently, in *Roberts*, as in the instant case, the underlying basis of the conclusion that the trial judge's statement of bias constituted reversible error is application of the due process clause.

Because the *Roberts* case is on all fours with the case presented, this Court accordingly could apply the reasoning in *Roberts* to control its disposition in this case, specifically that "[o]nce the [trial judge] expressed his *ardent* sentiments about [the character of one of the parties in the case], the *objective appearance of impartiality vanished.*" 625 F.2d at 129-30 (emphasis added).

---

[6] That is, it appears that the Trial Judge determined that his conclusion that Messrs. Griffith and Dale were good businessmen, knowledgeable about the oil business, and would not have put something in the Deed without some reason, *required* him to conclude that the Deed's all rights clause must be interpreted so as to conclude that the parties intended *only* the property interest held by the grantor at the moment the Deed was executed would convey. Of course, it does not logically follow that merely because Messrs. Griffith and Dale were good businessmen, knowledgeable about the oil business and would not have put something in the Deed without some reason that they necessarily would have intended that *only* that property interest held by the grantor at the moment the Deed was executed would convey. Indeed, there is a persuasive argument to the contrary based on undisputed principles of contract construction and the after-acquired title doctrine (*see* pp. 15-18 *infra*).

The reasoning followed in *Roberts* might further be applied to the facts presented to formulate as a controlling rule: If a statement by a trial judge would lead a reasonable person to question the impartiality of the trial judge and the judge did not recuse himself, then reversible error is committed. Application of that rule to the facts presented leaves no doubt that a reasonable person would question the impartiality of the Trial Judge following his utterance of the Statement of Bias, particularly because the Trial Judge determined that his conclusions about Messrs. Griffith and Dale expressed in the Statement of Bias *required* him to conclude that the Deed's all rights clause must be interpreted so as to conclude that the parties intended, notwithstanding the clear grant of a 9/32's interest by the Deed's granting clause, *only* the 4.5/32's mineral interest held by the grantor at the moment the Deed was executed would pass to the grantee.

Also, this Court could apply in the circumstances presented the following analytical test which the Court set forth in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966):

> The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Berger v. United States, 255 U.S. 22 [additional citations omitted].

Id. at 583. (In *Grinnell* the Court determined that any adverse attitudes demonstrated by the trial judge were based on his study of evidence and pleadings filed in the proceeding and consequently any bias by him was not improper.)

Applying the *Grinnell* test to the facts presented, first it should be concluded that in the Trial Court proceeding, the Trial Judge's Statement of Bias clearly represented a predisposition toward the evidence, *i.e.*, bias.

Second, the Trial Judge's Statement of Bias clearly stemmed from an extrajudicial source. The face of the Statement of Bias makes clear that the Trial Judge's opinion was not derived from his participation in the proceeding but instead was derived from his personal impressions, apparently

formed decades ago, of the predecessors-in-interest to the parties before him.

Finally, the specific remarks of the Trial Judge reflected in the Statement of Bias and the hearing transcript, as well as the timing of the Trial Judge's Statement of Bias, which was made immediately prior to announcing his decision in the case, strongly support the conclusion that the Trial Judge's opinion on the merits resulted from a basis other than that which he learned from his participation in the case. Reinforcing the conclusion of the controlling effect of the Trial Judge's bias is the fact that his decision was completely contrary to well-settled principles and rules of construction of deeds. *See* discussion at pp. 15-18, *infra.*

3. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO STATE HOW THE GUARANTEES OF THE DUE PROCESS CLAUSE PROHIBIT ISSUANCE OF A STATE COURT DECISION WHICH IS SO CLEARLY ERRONEOUS AS TO CONSTITUTE ARBITRARY AND CAPRICIOUS ACTION.

In 1927 this Court stated "[w]e cannot interfere [in a state court decision] unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' " *American Railway Exp. Co. v. Kentucky, supra* at 273, *quoting Pennoyer v. Neff, supra.*

This case provides the Court with the opportunity to reaffirm that principle stated in *American Railway* more than half a century ago[7] and to articulate under what circumstances

[7] In earlier cases, the Court had also enunciated that principle. *See, e.g.,* Tracy v. Ginzberg, 205 U.S. 170 (1907); this Court stated that although generally the Court will not interfere with a decision of a state court involving nothing more than ownership of property, with all parties in interest before it, a deprivation of property without due process of the law can occur when it results from the arbitrary exercise of power. *See, e.g.,* Postal Telegraph-Cable Co. v. City of Newport, 247 U.S. 464 (1918) (decision of a state court is so clearly ill-founded that the judgment cannot be sustained).

and to what extent the guarantees of the due process clause prohibit clearly erroneous state judicial action.

In applying the principle articulated by the Court in *American Railway*, it is useful to review the discussion of that principle included in a dissenting opinion on a denial of certiorari, *Watson v. Kenlick Coal Co.*, 498 F.2d 1183 (6th Cir. 1974), *cert. denied* 422 U.S. 1012 (1975) (Douglas, J., dissenting) in which it was stated that

> the interpretation and delineation of contractual and property rights is ordinarily a matter of state law, pure and simple, ... an adverse interpretation by a state court, even if erroneous, does not constitute a deprivation of property without due process of law. On the other hand, the Due Process Clause of the Fourteenth Amendment is not wholly without content for purposes of evaluating the arbitrariness of actions by the State; state enactments and regulations may be tested under that Clause against a modest but identifiable standard of minimum rationality. See Williamson v. Lee Optical Co., 348 U.S. 483, 490-491 (1955); cf. Roe v. Wade, 410 U.S. 113 (1973).

Id. at 1018.

Application of the *American Railway* principle to the facts of this case, where there is a complete lack of rational basis for the decision on the merits, should compel this Court to conclude that the decision below is so arbitrary and capricious as to violate the due process clause of the fourteenth amendment. In fact, the Trial Judge's decision was completely contrary to well-settled principles and rules of deed construction under Mississippi real property law. Under Mississippi law, the starting point in construction of a deed is to assume that the deed in question is unambiguous and to attempt to harmonize and give effect to all parts of the deed under a "four corners" construction approach to the instrument. *See e.g., Columbus & Greenville Ry. v. City of Greenwood*, 390 So.2d 588, 591 (Miss. 1980).

If, however, the deed contains elements of ambiguity which cannot be harmonized, the following rules of construction should control: (1) A deed should be construed most

strongly against the grantor and most favorably to the grantee, *e.g., Ouber v. Campbell,* 202 So.2d 638, 641 (Miss. 1967); (2) Where all parts of a deed cannot be harmonized, two conflicting clauses should be reconciled in favor of the first clause, particularly where the conflict is between the granting clause and a subsequent clause (or recital or habendum clause), *e.g., Mississippi Cent. R.R. Co. v. Ratcliff,* 59 So.2d 311, 314 (Miss. 1952); (3) In cases where two provisions in a deed may be in conflict and one provision must either be rejected or varied in order to harmonize the construction of a deed, a court will reject or vary the provision which is expressed in more general terms and about which it is more probable that the grantor was mistaken, *e.g., Dunn v. Stratton,* 133 So. 140 (Miss. 1931); and (4) In an ambiguous deed, the practical construction placed upon it by the parties will have much weight in determining meaning, *e.g., St. Regis Pulp & Paper Corp. v. Floyd,* 238 So.2d 740, 744 (Miss. 1970).

If the deed is construed to reflect that the parties to the deed intended to convey an interest greater than that which the grantor held on the date of the deed's execution, then the doctrine of after-acquired title or "estoppel by deed" is to be applied. That doctrine states that, where a grantor has no title or defective title, or has an estate which is less than he purports to convey, the execution and delivery of a warranty deed estops the grantor from later acquiring any adverse title or interest in the land, and any subsequently acquired title will inure to the benefit of the grantee. *See Turner v. Miller,* 276 So.2d 690, 693 (Miss. 1973); W. Ethridge, Jr., *The After-Acquired Property Doctrine and Its Application in Mississippi,* 17 Miss. L.J. 153 (1945).

Under a proper application of these principles to the facts presented, there can be no doubt but that a full 9/32's interest was conveyed to Robert B. Dale and his successors. Under the primary principle of deed construction, it should have been determined that the Deed was unambiguous; an attempt to harmonize all parts of the Deed should have been made. Accordingly, the all rights clause, which provides that the Deed was to convey "all of grantor's mineral rights," should have

been read as being consistent with the granting clause, which provides that the grantor was conveying a 9/32's interest in the mineral rights. That is, the all rights clause could certainly be reasonably interpreted as conveying not only all the interest of the grantor at the moment the Deed was executed but also that interest which he subsequently should acquire. Certainly, such an interpretation provides for a result recognized by Mississippi law under application of the after-acquired title doctrine.

Even if it were determined that the all rights clause created an ambiguity, application of the controlling principles cited above requires the conclusion that a 9/32's interest was conveyed. First, the Deed should have been construed most strongly against the grantor, Griffith. Second, assuming, *arguendo,* that there is a conflict between the first (granting) clause and the subsequent (all rights) clause, the conflict should be resolved in favor of the granting clause—which clearly states that a 9/32's interest was conveyed. Third, applying the principle that the more specific clause should prevail, of the two clauses in the Deed which could be read to be in conflict, the granting clause, clearly conveying a 9/32's interest, is the most definite and certain part of the Deed and should prevail over the arguably indefinite but certainly more general statement of the all rights clause.

Finally, a review of the practical construction placed upon the Deed by the parties indicates that subsequent to execution of the Deed, the grantee, Robert B. Dale, consistently represented that he had acquired the full 9/32's interest given him in the granting clause by, *e.g.,* executing leases for the underlying property containing provisions reflecting that assumption; whereas the grantor, Griffith, did not allege any claim to the 4.5/32's interest in dispute until after an oil and gas field had been discovered on the property—32 years *after* execution of the Deed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Mississippi Supreme Court.

Respectfully submitted,

HARKINS AND COMPANY

By: _____

WILLIAM F. COCKRELL, JR.
Counsel of Record
MICHAEL G. KUSHNICK
ROSE, SCHMIDT, DIXON & HASLEY
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 289-8300

KENNETH I. FRANKS
GLENN GATES TAYLOR
HARRY E. NEBLETT, JR.
HEIDELBERG, WOODLIFF & FRANKS
Suite 1030, Capital Towers
Jackson, Mississippi 39201

EDMUND L. BRUNINI, JR.
JOHN E. MILNER
BRUNINI, GRANTHAM, GROWER & HEWES
1400 First National Bank Building
P.O. Drawer 119
Jackson, Mississippi 39205
Counsel for Petitioners

Of Counsel:
R. FRED HOSEY
HARKINS AND COMPANY
P.O. Box 1940
Alice, Texas 78332

CERTIFICATE OF SERVICE

I, WILLIAM F. COCKRELL, JR., Counsel of Record for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 12th day of November, 1982, I served copies of the foregoing Petition For A Writ of Certiorari on the parties by mailing three copies of said document by first class United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

Donald B. Patterson, Esquire
P.O. Box 888
Brookhaven, Mississippi 39601

Armstrong & Hoffman
P.O. Box 190
Hazelhurst, Mississippi 39083

William E. Hathorn, Esquire
P.O. Box 759
Prentiss, Mississippi 39474

S. Wayne Easterling, Esquire
P.O. Box 870
Hattiesburg, Mississippi 39401

Alex A. Alston, Jr., Esquire
519 First National Bank Building
P.O. Drawer 1532
Jackson, Mississippi 39205

M. Ward Bailey, Esquire
24th Floor
Continental Life Building
Fort Worth, Texas 76102

Joe Dale, Esquire
P.O. Box 518
Prentiss, Mississippi 39474

Thomas, Price, Alston, Jones & Davis
519 First National Bank Building
P.O. Drawer 1532
Jackson, Mississippi 39205

M. M. Roberts, Esquire
P.O. Box 870
Hattiesburg, Mississippi 39401

I further certify that all parties required to be served have been served.

William F. Cockrell, Jr.

APPENDIX A

Minute Book BV Page 411

MINUTES, SUPREME COURT OF MISSISSIPPI

MARCH TERM, 1982

Wednesday, March 17, 1982, Court Sitting

 # 53,095

HARKINS & COMPANY, *et al.*

v.

JAMES W. ELLIOTT, JR., *et al.*

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Jefferson Davis County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order, adjudge and decree that the Decree of said Chancery Court rendered in this cause on the 7th day of January, 1981-be and the same is hereby affirmed. It is further ordered, adjudged and decreed that the appellants do pay all of the costs of this appeal to be taxed for which let proper process issue.

ATTEST

A True Copy
This the 10th day of September, 1982
ROBERT E. WOMACK, Clerk
SUPREME COURT OF MISSISSIPPI

By: /s/ K. GILLIS

APPENDIX B

IN THE
CHANCERY COURT OF
JEFFERSON DAVIS COUNTY, MISSISSIPPI

No. 6573

JAMES W. ELLIOTT, JR., *et al.*
Complainants

vs.

HARKINS AND COMPANY, *et al.*
Defendants

FINAL DECREE

The above styled and numbered cause came on to be heard at the November 1980 term of this Court on December 8, 1980 on Amended Bill of Complaint of complainants James W. Elliott, Jr., Tullius Brady, Donald B. Pierce, E. L. Dunn, Paul D. Smith, C. E. Locklin, Jr. and B. C. Griffith to Confirm and Quiet Title to Oil, Gas and Mineral and Leasehold Interest; Separate Answer and Cross-Bill of John S. Dale, Harold A. Dale, David B. Dale, Irene Dale Polk, Katherine D. Little, James L. Dale, Alberta D. Baylis, Muncie Dale Smith, Ethlyn D. Turnage, Marilyn B. Michael, Ben G. Walden, Jr., Bobbie W. Foster, M. R. Walden, Sr., Madison S. Dale, Frances D. Pillow, Joseph Dale, Betty D. Touchstone, Bess S. Dale, Sarah Dale Polk, Ada Dale Gulledge, Mancie Dale Johnson, Robert M. Dale, Thomas D. Dale, Robin Dale Fuller and Richard S. Dale; Separate Answer and Cross-Bill of Harkins and Company, St. Joe Petroleum (U.S.) Corporation, First Mississippi Corporation, Jerry E. Zoble, A. G. Holzapfel, Trustee for Mississippi-Alabama Employees Trust No. 2 and Harkins and

Company Employees Profit Sharing Plan No. 1., H. B. Harkins, Harry W. Hamilton, Harry W. Hamilton, Agent, James R. Lesch, Raymond M. Holliday, Ray Butler, First Energy Corporation, Granville G. Tunstill, Warren Donaldson, H. D. Lee and Troy Anderson; Separate Answer and Cross-Bill of the Defendant Amerada Hess Corporation; Separate Answer of defendant Transcontinental Gas Pipeline Corporation; Answer of the Cross-Defendants James W. Elliott, Jr., et al., to the Cross-Bill of Cross-Complainants John S. Dale, et al.; Answer of the Cross-Defendants James W. Elliott, Jr., et al., to the Cross-Bill of Cross-Complainants Harkins and Company, et al.; Answer of Cross-Defendants James W. Elliott, Jr., et al., to the Cross-Bill of Cross-Complainant Amerada Hess Corporation; Answer of B. C. Griffith to the Cross-Bill of John S. Dale, et al.; Answer of B.C. Griffith to the Cross-Bill of Harkins and Company, et al.; service of process upon all non-answering parties in the manner and for the time required by law; Motion of Complainants for Decree Pro Confesso and Decree Pro Confesso against defendants Betty D. Mortimer, Wil-Ken, Inc., R. Edwin Dale, Jr., Nancy Dale McAfee, Betty Dale Garner, Mary Dale Wasson, Candel Oil (U.S.), Inc., William A. Yeager, Jr., Trustee, and The First National Bank of Midland, Midland, Texas; and complainants and all answering defendants and cross-complainants and cross-defendants being present or represented by their respective attorneys of record, and the Court having heard, received and considered a stipulation of the parties as to the defendant Transcontinental Gas Pipeline Corporation, and oral and documentary evidence offered by the various parties, and the Court having heard and considered argument of counsel and the Court now being fully advised in the premises doth find, order and adjudicate as follows:

1. That this Court has jurisdiction of the parties and the subject matter.

2. The subject matter of this litigation is the ownership of an undivided 4.25/32nds less 22.5 mineral acre interest in and

to the oil, gas and other minerals in, on and under the following described land:

> SW 1/4 of SE 1/4 of Section 8; SW 1/4 of NW 1/4 and W 1/2 of SW 1/4 of Section 9; and the NE 1/4 of Section 17, Township 5 North, Range 19 West, Jefferson Davis County, Mississippi, LESS AND EXCEPT the right-of-way of the Gulf & Ship Island Railroad and its successors, in, on, over and across the hereinabove described land;

and it is hereby adjudicated that the complainant, B. C. Griffith, is the owner of said undivided 4.25/32nds less 22.5 mineral acre interest in and to the oil, gas and other minerals in, on and under said land, and that the complainants James W. Elliott, Jr., Tullius Brady, Donald B. Pierce, E. L. Dunn, Paul D. Smith and C. E. Locklin, Jr., jointly, are the owners of a good and valid oil, gas and mineral lease covering the aforesaid mineral interest owned by B. C. Griffith, as evidenced by Oil, Gas and Mineral Lease from B. C. Griffith to James W. Elliott, Jr., dated October 14, 1976, and of record in OG&ML Book 100, page 372 of the records in the office of the Chancery Clerk of Jefferson Davis County, Mississippi, and subsequent assignments thereof, as set out in complainants' deraignment of title, and that the title of the complainant B. C. Griffith in and to said undivided interest in and to said oil, gas and other minerals in, on and under the hereinabove land and the oil, gas and mineral leasehold interest of the complainants James W. Elliott, Jr., Tullius Brady, Donald B. Pierce, E. L. Dunn, Paul D. Smith and C. E. Locklin, Jr., be, and the same is, hereby quieted and confirmed as against all of the defendants herein, and that the claims of any and all defendants which cast clouds, doubts or suspicions upon said ownwership be, and they are, hereby cancelled, annulled and held for naught, and that the cross-bills of the cross-complainants John S. Dale, et al., Harkins and Company, et al., and Amerada Hess Corporation be, and they are hereby dismissed with prejudice.

3. That as per stipulation of the parties Transcontinental Gas Pipeline Corporation is simply a stakeholder in this matter and that no evidence was required from Transcontinental Gas

Pipeline Corporation regarding the amount or value of gas and distillate runs from the properties involved in this lawsuit and that the payment by Transcontinental Gas Pipeline Corporation to the defendant oil and gas companies shall continue as it has in the past, but that, although accounting may be necessary in the future, same is not required in the present proceeding.

4. That all costs herein be, and the same are, hereby taxed against the defendants.

5. In the event the defendants herein desire to appeal to the Mississippi Supreme Court and shall desire to supersedeas, bond shall be given by them, payable to the complainants, with two or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in the state, in a penalty of $10,000.00, conditioned that they will satisfy the judgment or decree complained of, a supersedeas shall issue once such bond shall have been given.

6. That this Final Decree may be entered in vacation pursuant to agreement of counsel and to Order of this Court dated December 8, 1980.

SO ORDERED, ADJUDGED AND DECREED, this the 7th day of January, A.D. 1981.

/s/ J. W. WALKER

Chancellor

APPENDIX C

MINUTES, SUPREME COURT OF MISSISSIPPI

MARCH TERM, 1982

Wednesday, June 30, 1982, Court Sitting

 # 53,095

HARKINS & COMPANY, *ET AL.*

v.

JAMES W. ELLIOTT, JR., *ET AL.*

This cause this day came to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

ATTEST

A True Copy
This the 15th day of September, 1982
ROBERT W. WOMACK, Clerk
SUPREME COURT OF MISSISSIPPI

By: /s/ M. MURPHY

MINUTE BOOK "BV" PAGE 525

APPENDIX D

IN THE
CHANCERY COURT OF
JEFFERSON DAVIS COUNTY, MISSISSIPPI

No. 6573

JAMES W. ELLIOTT, JR., *et al.*
COMPLAINANTS AND CROSS-DEFENDANTS

VS.

HARKINS AND COMPANY, *et al.*
DEFENDANTS AND CROSS-COMPLAINANTS

BILL OF EXCEPTIONS

Come now the Defendants, Harkins and Company, et al., pursuant to Mississippi Code Annotated, Section 11-5-73, and other applicable Code Sections, and present and tender this their Bill of Exceptions in order to make the following matter a part of the record in this cause, which matter would not otherside appear of record, said Bill of Exceptions being as follows, to-wit:

1.

At the trial of this matter on December 8, 1980 in term time at the Courthouse in Prentiss, Mississippi, after the presentation of evidence and testimony by the Complainants and Defendants and after the argument of counsel thereon, but before the Court entered into its finding of facts and conclusions of law, the Court made the following statement from the bench:

> "I knew both B. C. Griffith and Robert Dale, they weren't anybody's fools, they were good business men and knowledgeable about the oil business

and would not have put something in the instrument without some reason, unless it meant something."

2.

Defendants respectfully request that this tendered Bill of Exceptions be found correct and be promptly signed by the Judge who presided therein for purposes of making this matter a part of the record in this case.

THIS, the 18th day of December, 1980.

Respectfully submitted,

HARKINS AND COMPANY;
ST. JOE PETROLEUM (U.S.) CORPORATION;
FIRST MISSISSIPPI CORPORATION;
JERRY E. ZOBLE;
A. G. HOLZAPEL, Trustee for Mississippi—Alabama Employees Trust No. 2 and Harkins and Company; Employees Profit Sharing Plan No. 1;
H. B. HARKINS;
HARRY W. HAMILTON;
HARRY W. HAMILTON, AGENT;
JAMES R. LESCH;
RAYMOND M. HOLLIDAY;
RAY BUTLER;
FIRST ENERGY CORPORATION;
GRANVILLE G. TUNSTILL;
WARREN DONALDSON;
H. D. LEE; and
TROY ANDERSON

By: /s/ GLENN GATES TAYLOR

Kenneth I. Franks
Glenn Gates Taylor

Attorneys for Said Defendants

Of Counsel:
KENNETH I. FRANKS
GLENN GATES TAYLOR
HEIDELBERG, WOODLIFF & FRANKS
Suite 1030 Capital Towers
Jackson, Mississippi 39201
(601) 948-3800

I, the undersigned J. W. WALKER, Chancellor, have examined the above and foregoing Bill of Exceptions and have found it to be correct.

THIS, the 31st day of December, 1980.

/s/ J. W. WALKER

J. W. Walker, Chancellor

82-801

No. A-272

Office-Supreme Court, U.S.
FILED
DEC 15 1982
ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

October Term, 1982

HARKINS AND COMPANY, et al.,
Petitioners,

vs.

JAMES W. ELLIOTT, JR., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ALEX A. ALSTON, JR.
(Counsel of Record)
MARY C. HENKEL
THOMAS, PRICE, ALSTON, JONES & DAVIS
519 First National Bank Building
Post Office Drawer 1532
Jackson, Mississippi 39205
Telephone: (601) 948-6882

DONALD B. PATTERSON
Kees Building
Post Office Box 888
Brookhaven, Mississippi 39601
Telephone: (601) 833-7071

JOHN T. ARMSTRONG
ARMSTRONG & HOFFMAN
Post Office Box 190
Hazlehurst, Mississippi 39083

WILLIAM E. HATHORN
Post Office Box 759
Prentiss, Mississippi 39474
Counsel for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Does Rule 43(a) of the Rules of the Supreme Court of Mississippi, providing that no appellate opinion will generally be written in cases affirming the trial court, violate the due process clause of the United States Constitution?

2. Is this Court's jurisdiction shown where Petitioners raise for the first time in their petition for certiorari a claim that judicial bias violating due process was shown by the trial judge's comment that he knew both parties' predecessors in interest were good businessmen?

3. Even if a decision of the state courts is completely inconsistent with the state substantive law precedent, is federal due process infringed or the jurisdiction of this Court properly invoked?

PARTIES TO THE PROCEEDING BELOW

Petitioners' list of the parties below is satisfactory and is adopted by reference.

TABLE OF CONTENTS

Questions Presented I
Parties to the Proceeding Below II
Opinion Below 1
Lack of Jurisdiction 1
Constitutional Provision Involved 4
Statement of the Case 5
Summary of the Argument 7
Argument in Opposition to Granting the Writ 9

1. Rule 43(a) of the Rules of the Supreme Court of Mississippi Is Constitutional 9
2. No Issue of Improper Bias of a Judge in State Court Proceedings, Violative of Due Process, Is Properly Presented in This Case 12
3. The Due Process Clause of the United States Constitution Does Not Guarantee State Litigants the Benefit of Prior State Law Precedents 14

Conclusion 16
Appendix A 17

Table of Cases

Agins v. Tiburon, 447 U.S. 255, 259 (1980) 4, 15
American Railway Express v. Kentucky, 273 U.S. 269, 272-273 (1927) 14, 15
Anders v. California, 386 U.S. 738 (1967) 11
Arrowsmith v. Harmoning, 118 U.S. 194, 195 (1886) 15
Bessler Movable Stairway Co. v. Bank of Leakesville, 140 Miss. 537, 106 So. 445 (1926) 3, 10
Black v. Washington, 65 Miss. 60, 3 So. 140 (1887) 3, 10
Bonner v. Gorman, 213 U.S. 86, 91 (1909) 15

Bowe v. Scott, 233 U.S. 658, 663 (1914) 2
Cardinale v. Louisiana, 394 U.S. 437, 439 (1969) 4
Chandler v. Florida, 449 U.S. 560, 570 (1981) 12
Colson v. Sims, 220 So. 2d 345, 346 (Miss. 1969) 3, 10
Crooker v. Hollingsworth, 210 Miss. 636, 46 So. 2d 541 (1950) 15
Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197 (1965) 4
Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 166 (1917) 14
Estate of Briscoe v. Briscoe, 255 So. 2d 313, 314-15 (Miss. 1971) 3, 10
Goldberg v. Kelly, 397 U.S. 254 (1970) 10, 11
Harkins and Company, et al. v. Elliott, et al., No. 53,095 (Miss. Sup. Ct. Mar. 17, 1982), *reh'g denied*, June 30, 1982 .....2, 13
Iowa Central Railway v. Iowa, 160 U.S. 389, 393 (1896) 15
Mathews v. Eldridge, 424 U.S. 319, 333 (1976) 10
McDonald v. Oregon Railroad & Navigation, 233 U.S. 665, 669 (1914) 15
McLaurin v. Royalties, Inc., 231 Miss. 240, 95 So. 2d 105 (1957) 15
Michigan v. Tyler, 436 U.S. 499, 500 (1978) 3, 14
Moore v. Illinois, 408 U.S. 786, 799 (1972) 3, 13
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928) 2
Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454, 460-61 (1907) 4, 15
Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 (1980) 2
St. Louis & San Francisco Railroad v. Shepherd, 240 U.S. 240, 241 (1916) 2

Sumner v. Mata, 449 U.S. 539 (1981) 11, 12
Tacon v. Arizona, 410 U.S. 351 (1973) 3, 13
Tracy v. Ginzberg, 205 U.S. 170, 177 (1907) 15
Webb v. Webb, 451 U.S. 493, 499-502 (1981) 4
Wood v. Strickland, 420 U.S. 308 (1975) 11
Younger v. Harris, 401 U.S. 37, 44 (1971) 16

Constitution

Constitution of the United States, fourteenth amendment, section 1 4

Statutes

28 U.S.C. § 1257(3) 1
28 U.S.C. § 2254 12

Other Authorities

Rule 52, Federal Rules of Civil Procedure 12
Rules 16.7 and 23.1, Rules of the Supreme Court of Mississippi 12
Rule 43(a), Rules of the Supreme Court of Mississippi 1, 7, 8, 9, 12

No. A-272

In the Supreme Court of the United States

October Term, 1982

HARKINS AND COMPANY, et al.,
Petitioners,

vs.

JAMES W. ELLIOTT, JR., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

OPINION BELOW

Petitioners Harkins and Company, et al. ("Harkins") have satisfactorily cited the opinions and judgments delivered below.

LACK OF JURISDICTION

Harkins claims jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). It does not in its jurisdictional statement, or elsewhere in its petition, show this Court's jurisdiction by virtue of questions properly presented and considered by the state courts below.

Though Harkins never explicitly cites the rule, it attacks Rule 43(a) of the Rules of the Supreme Court of Mississippi, which states:

> (a) *Written Opinions.* In all cases where the judgment or decree of the trial court is affirmed, no opinion will be written unless a majority of the Justices deciding the case determine that a written opinion will add to the value of the jurisprudence of this State.

Harkins made no claim of federal due process right to a written opinion in its petition for rehearing, claiming merely that "[t]he panel erred as a matter of law. . . ." (Appendix A at 6). The State Supreme Court denied the petition for rehearing without any discussion of the circumstances in which state or federal law might require a written opinion to affirm a lower court. This Court has long held that it will not take jurisdiction of a question neither properly raised nor considered below. *St. Louis & San Francisco Railroad v. Shepherd*, 240 U.S. 240, 241 (1916); *Bowe v. Scott*, 233 U.S. 658, 663 (1914).

Harkins next attacks an alleged "Statement of Bias" by the trial judge below as a deprivation of its rights to due process of law. Its summary of the appellate argument below [Petition at 4] like that argument itself [Brief for Appellants at 23-25, *Harkins and Company, et al. v. Elliott, et al.*, No. 53,095 (Miss. Sup. Ct. Mar. 17, 1982), *reh'g denied*, June 30, 1982], makes no reference whatsoever to any federal right, the fourteenth amendment or due process. Knowing that only a possible evidentiary error, not judicial bias violative of federal due process rights, was claimed below, Harkins boldly asserts that *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), and *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 n. 9 (1980), supports an argument that points presented to the lower court without any reference to federal constitutional rights will invoke this Court's jurisdiction. These cases support no such argument. In

each of these cases, there was some showing that the state courts were at least notified that constitutional rights were claimed to be at issue. Such was not the case here.

Furthermore, Harkins incorrectly asserts in Question 1 of its Questions Presented, Petition at (i), and throughout its Petition, that error in the trial judge's allegedly biased statement "was first properly raised before the State Supreme Court." In fact, the rule in Mississippi is that alleged errors of the trial court must be presented to it by objection or motion, giving the lower court an opportunity to rule on them, in order to properly preserve them on appeal. *Bessler Movable Stairway Co. v. Bank of Leakesville,* 140 Miss. 537, 106 So. 445 (1926); *Black v. Washington,* 65 Miss. 60, 3 So. 140 (1887); *Estate of Briscoe v. Briscoe,* 255 So. 2d 313, 314-315 (Miss. 1971); *Colson v. Sims,* 220 So. 2d 345, 346, n. 1 (Miss. 1969). Harkins did not object in the trial court to the judge's comment, did not move the judge to recuse himself, and did not make any post-hearing motion in light of the statement after the ruling against Harkins. Mississippi has a legitimate interest in requiring litigants to present any objection to what they consider judicial bias directly to the trial judge, and Harkins' default in this regard bars this claim in this Court. *Michigan v. Tyler,* 436 U.S. 499, 500 n. 7 (1978).

Lastly, Harkins attempts to put matters of Mississippi law governing the construction of deeds before this Court by the device of claiming that the trial court's judgment and the State Supreme Court's affirmance denied due process of law by reason of inconsistency with controlling state precedent. This contention is raised for the first time in this Court. This Court does not have jurisdiction of issues raised for the first time before it. *Tacon v. Arizona,* 410 U.S. 351 (1973) (*per curiam*); *Moore v. Illinois,* 408 U.S 786, 799 (1972). Whether or not a state

court decision is "wrong" or inconsistent with state precedent, litigants have no liberty or property interest in the benefit of prior precedent. *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 460-61 (1907); *Agins v. Tiburon*, 447 U.S. 255, 259 n. 6 (1980). To recognize such a "right" would freeze the jurisprudence of the states in a time lock wholly inconsistent with the traditions of the evolving common law and of federal-state comity.

> It is appropriate to emphasize again, see *Cardinale v. Louisiana*, [394 U.S. 437] at 439 [(1969)], that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

Webb v. Webb, 451 U.S. 493, 499 (1981); and further discussion, *Id.* at 499-502.

Harkins fails to sustain its burden of proof to show jurisdiction, *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194, 197 (1965), and the writ of certiorari must be denied.

CONSTITUTIONAL PROVISION INVOLVED

Respondent Elliott ("Elliott") acknowledges that Harkins bases its arguments on the Constitution of the United States, fourteenth amendment, section 1, and that Harkins has correctly quoted the same, but denies that the provision has any application here.

STATEMENT OF THE CASE

The Chancery Court of Jefferson Davis County, Mississippi, on January 7, 1981, issued its final decree confirming and quieting the title of Elliott to a disputed 4.5/32nds interest in gas-producing land. Elliott claims through B. C. Griffith, grantor in the disputed deed construed by the trial court, and Harkins claimed through Robert B. Dale, the grantee in that deed.

The evidence showed that at the time of the original deed from Griffith to Dale, Griffith owned only a 4.5/32nds interest. Griffith's deed to Dale indicated in the granting clause that a 9/32nds interest was to be conveyed, but limited that grant in a clause stating that "this instrument is to convey to grantee all of grantor's mineral rights in and to the above described land" (hereinafter "limitation clause"). The trial court construed the deed to pass only the 4.5/32nds interest then owned by Griffith to Dale, and held that an interest which Griffith later acquired remained vested in Griffith and his grantees, Elliott, et al.

At a break in the proceedings at trial, off the record, the trial judge commented:

> I knew both B. C. Griffith and Robert Dale, they weren't anybody's fools, they were good businessmen and knowledgeable about the oil business and would not have put something in the instrument without some reason, unless it meant something.

No objection was made to the statement or to the trial judge's qualification to rule on the case at the time the statement was made; no motion to recuse was entered at that or any time; and no post-hearing motion was brought before the trial court on the basis of the statement.

The trial court approved and signed a Bill of Exceptions presented by Harkins after the close of the proceedings and issuance of the decree. This Bill of Exceptions served to make the comment of record but not to inform the judge of any objection to it.

Under Rule 6 of the Rules of the Supreme Court of Mississippi, all errors to be considered on appeal must be distinctly assigned in the Assignments of Error. Harkins' appeal to the State Supreme Court assigned as error only the following:

I.

The Lower Court erred in holding that the after-acquired mineral interest of B. C. Griffith did not pass or inure to Robert B. Dale under the Doctrine of after-acquired title.

II.

The Lower Court erred in its construction of the July 5, 1944 Mineral Right and Royalty Transfer from B. C. Griffith to Robert B. Dale.

III.

The Lower Court erred in considering facts known to and personal opinions held by the Chancellor and which were not in evidence.

IV.

The Lower Court erred by excluding evidence that the July 5, 1944 Mineral Right and Royalty Transfer from B. C. Griffith to Robert B. Dale was not prepared by Robert B. Dale.

The State Supreme Court affirmed without opinion on March 17, 1982, the usual procedure for affirmance in that court pursuant to its Rule 43(a), *supra*. Harkins subsequently filed a petition for rehearing in the State Supreme Court, which is set out in full as Appendix 1. At no point in any of these proceedings did Harkins cite the federal constitution, federal due process rights, the fourteenth amendment, or any cases relying thereon, or otherwise give any indication to the courts of the state that it intended to present claims pursuant to the fourteenth amendment to the Constitution of the United States, section 1, or that it considered such rights at issue.

The State Supreme Court denied the petition for rehearing on June 30, 1982, and Harkins, after obtaining an extension of time to do so, filed the instant petition for a writ of certiorari on or about November 12, 1982, and same was received by counsel of record for Elliott on November 15, 1982.

SUMMARY OF THE ARGUMENT

Harkins attacks *sub silentio* Rule 43(a) of the Rules of the Supreme Court of Mississippi, providing that no appellate opinion will generally issue in cases affirming the trial court. Harkins maintains that a written opinion is constitutionally mandated, at least where a constitutional claim is first properly raised in the State Supreme Court. No constitutional claim was raised in the Mississippi Supreme Court, nor was Harkins entitled to raise its alleged claim there for the first time. This Court's opinions defining the minimal due process applicable when the government initially deprives citizens of private interests have no relevance to the issuance of written opinions by state appellate courts. Harkins had a full trial which satisfied

due process. The Constitution does not mandate that state appellate courts write full opinions in every case, and this Court will not assume a supervisory role over the rules of the state courts. Rule 43(a) of the Rules of the Mississippi Supreme Court is constitutional.

The comment of the trial judge below allegedly showing bias is ambiguous on its face, and does not show bias for or against either side in the litigation. Even if it did, however, the error was not properly preserved under state rules, nor was constitutional error argued to the State Supreme Court. Harkins' argument that the trial judge's statement reflected bias which deprived Harkins of property without due process is thus not properly before this Court, and is foreclosed on independent state grounds.

Harkins asserts that this Court should reverse the Mississippi courts on a matter of deed construction wholly governed by state law because the state courts allegedly departed from prior state substantive law precedent. This contention does not properly raise a federal question and has been soundly rejected by this Court on many occasions.

ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

Harkins' petition presents nothing novel, unsettled or worthy of further consideration by this Court. Its attempt to constitutionalize elementary alleged errors of state law, on which the state courts have ruled against it, is nothing new to this Court. The claims Harkins raises, stripped of the semantic camouflage devised to obscure their failure to properly present any federal question, are in truth old propositions on which this Court has long since ruled, and ruled adversely.

1. Rule 43(a) of the Rules of the Supreme Court of Mississippi Is Constitutional.

Harkins, without citing Rule 43(a) of the Rules of the Supreme Court of Mississippi, attacks that rule, and its application in this case to affirm without opinion the ruling of the lower court against Harkins. Harkins contends that it was entitled to a written opinion from the State Supreme Court, first, on the false premise that it was entitled to raise for the first time before the State Supreme Court a claim relating to the comment made by the trial judge. Harkins did not present any claim of unconstitutional bias, even for the first time, before the State Supreme Court. See "Lack of Jurisdiction," *supra*, and point 2, *infra*. Harkins' second mistake is a misreading of this Court's precedents concerning the applicable minima of due process in connection with various governmental takings.

Harkins asserts, erroneously, that an allegation of error based on a trial judge's comment may be first properly raised in the Mississippi Supreme Court. To the contrary, Mississippi maintains a strict rule of contemporaneous ob-

jection, requiring the submission of discrete alleged errors to a ruling by the trial judge immediately upon their occurrence, and further requiring the submission of cumulative errors, such as the return of a verdict against the weight of the evidence or evincing bias and prejudice, to a ruling of the trial court by way of a post-trial motion. *Bessler Movable Stairway Co. v. Bank of Leakesville,* 140 Miss. 537, 106 So. 445 (1926); *Black v. Washington,* 65 Miss. 60, 3 So. 140 (1887); *Estate of Briscoe v. Briscoe,* 255 So. 2d 313 (Miss. 1971); *Colson v. Sims,* 220 So. 2d 345, 346 n. 1 (Miss. 1969).

Next, in Harkins' argument that this Court should compel a state appellate court to write an opinion on every case before it, Harkins misplaces its reliance on prior decisions of this Court dealing with the court, tribunal or authority of original jurisdiction in matters of governmental deprivation of private interests.

Harkins cites *Mathews v. Eldridge,* 424 U.S. 319 (1976), and *Goldberg v. Kelly,* 397 U.S. 254 (1970), in support of its novel proposition that this United States Supreme Court should require written opinions from state supreme courts in all cases, or in all cases in which a due process claim is allegedly first properly raised before the appellate court. This reliance is misplaced. *Mathews* and *Goldberg* involved administrative decision makers. The question at issue in each of these cases was, as stated in *Mathews,* 424 U.S. at 333, whether or not "a hearing closely approximating a judicial trial is necessary" in connection with the government's taking action affecting a private interest. Furthermore, the substantiality of the private interest is defined in these cases, not in monetary sums, but in terms of the threat posed by the deprivation to the citizen's most basic liberties, or very means of survival. In *Mathews,* social security disability income was held not to be vital enough, even by this standard, to deserve, as did the sub-

sistence welfare benefits in *Goldberg*, a hearing approximating a judicial trial.

These cases are wholly irrelevant to Harkins' claim. It had a full judicial trial and a written final judgment issued by the trial court.

The rest of the cases cited in the Petition at 8-10 involve for the most part this Court's comments, in the course of its proper supervision of the lower federal courts, on the need for original written findings of fact by the federal trial courts, including district courts and three-judge courts. For example, *Wood v. Strickland*, 420 U.S. 308 (1975), does not support Harkins' proposition that a written statement is constitutionally mandated in all cases where issues of constitutional due process are presented. In fact, this Court stated in *Wood* that it would decline to consider an argument supporting the federal appeals court judgment, based on a procedural due process point not addressed by the court of appeals or district court below. *Anders v. California*, 386 U.S. 738 (1967), and *Sumner v. Mata*, 449 U.S. 539 (1981), likewise wholly fail to support the propositions for which Harkins cites them. These are cases dealing with the writ of habeas corpus attacking criminal conviction, thus involving the total deprivation of a citizen's liberty by the government, and are distinguishable on that basis alone from Harkins' case, involving a judgment settling rights to real property between two private citizens. Neither case, however, even supports the proposition that a state supreme court is constitutionally obliged to issue a written opinion when affirming the judgment of a lower court on a prisoner's collateral attack on conviction. As explained in *Sumner*, the federal right of habeas corpus is considered so vital that appellate courts are uniquely empowered to make or reverse findings of fact in such cases. However, when reversing judgments of state courts, and in the interests of federalism, federal courts are required to

discuss and make findings on any ruling that the state court erred on the facts.

Harkins here urges this court to employ the federal due process clause to create a new rule for state supreme courts. This argument runs entirely counter to the cautions expressed in *Sumner*, which emphasizes a due regard for considerations of federalism.

Rule 43(a) of the Rules of the Supreme Court of Mississippi is entirely valid and consistent with federal due process. It has a parallel in Rules 16.7 and 23.1 of this Supreme Court, providing for summary disposition on the merits in cases arising both under this Court's obligatory appellate jurisdiction and upon petition for certiorari.

This Court eschews the assumption of a supervisory role over the state courts. *Chandler v. Florida*, 449 U.S. 560, 570 (1981). Neither Rule 52 of the Federal Rules of Civil Procedure nor 28 U.S.C. § 2254, on which most of Harkins' cited cases turn, are of constitutional magnitude; nor do they have any application to the Mississippi Supreme Court. Harkins' contention is without support in precedent or in the policy considerations of federalism and should be denied even if it had been properly raised.

2. No Issue of Improper Bias of a Judge in State Court Proceedings, Violative of Due Process, Is Properly Presented in This Case.

The off-the-record statement of the trial judge in this case, to which Harkins refers in its Petition, though nowhere below, as the "Statement of Bias," was as follows:

> I knew both B. C. Griffith [Elliott's predecessor in interest] and Robert Dale [Harkins' predecessor in interest], they weren't anybody's fools, they were good businessmen and knowledgable about the oil business and would not have put something in the instru-

> ment without some reason, unless it meant something.

This passing comment of the chancellor, in a trial without a jury, is completely neutral as to the predecessors of parties on both sides of the litigation. Since the debate below was about whether the granting clause, mentioning a 9/32nds interest, or the limitation clause would control, a remark about putting "something in the instrument" is really entirely ambiguous. The remark favored neither side. Harkins concedes that the statement does not evince any type of bias previously recognized by this or lower federal courts. Petition at 10 n. 3.

No discussion of the meaning or constitutional impact of the comment was had below. Harkins did not raise it in the trial court and argued in the State Supreme Court only that it was an evidentiary impropriety. *Harkins, supra,* Brief for Appellants at 23-25. The statement was not even mentioned in Harkins' petition for rehearing. See Appendix A.

The issue of whether state evidentiary rules of law were properly applied is not subject to review in this court. *Moore v. Illinois,* 408 U.S. 786, 799 (1972).

The claim that the statement evinced bias depriving Harkins of due process is, as discussed above, raised for the first time in this Court and is thus not subject to this Court's consideration. *Moore v. Illinois,* 408 U.S. 786 (1972); *Tacon v. Arizona,* 410 U.S. 351 (1973) (*per curiam*). Mississippi has a legitimate interest in requiring that litigants object, move for recusal, or move for a new trial in the court of original jurisdiction. A trial judge deserves at least to be informed that a party perceives bias and prejudice in a statement of the court, and deserves an initial opportunity to consider recusal in the interest of propriety or the appearance of same. By submission of its

Bill of Exceptions, Harkins put the statement in the record, but only after the verdict against it, and without any indication to the trial court of any manner or regard in which it felt it was wronged by the statement, and without allowing that court any opportunity to grant a new trial in the matter, before another judge or otherwise. Thus, under the rule of *Michigan v. Tyler*, 436 U.S. 499 (1978), the issue is foreclosed on independent state grounds.

3. The Due Process Clause of the United States Constitution Does Not Guarantee State Litigants the Benefit of Prior State Law Precedents.

Harkins wants this court to reverse the Mississippi Supreme Court on a question governed wholly by state law rules of deed construction. It asserts that this Court should meddle in state substantive law in this manner because the state court decision was "so clearly erroneous as to constitute arbitrary and capricious action." For the principle that this Court will do so it relies almost entirely on *American Railway Express v. Kentucky*, 273 U.S. 269 (1927).

Harkins' contention is very ill-supported by *American Railway Express*. *American Railway Express* concerned a judgment, affirmed without opinion on appeal, in favor of the state and imposing liability on a purchaser of bulk assets for a debt of its predecessor to the state. In refusing to interfere with the Kentucky court's judgment, this Court stated, *inter alia*:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."

Id. at 272-73, quoting *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 166 (1917).

Any weight to be given the dictum to which Harkins clings, *id.* at 273, implying that this Court will interfere where a "judgment amounts to mere arbitrary or capricious exercise of power," must be given with regard to the context of *American Railway Express.* That case involved the state court's judgment in favor of the state, not its adjudication of a controversy between private parties as in the present case. The paragraph which follows that dictum states forcefully:

> It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *Arrowsmith v. Harmoning,* 118 U.S. 194, 195 (1886); *Iowa C. R. Co. v. Iowa,* 160 U.S. 389, 393 (1896); *Tracy v. Ginzberg,* 205 U.S. 170, 177 (1907); *Bonner v. Gorman,* 213 U.S. 86, 91 (1909); *McDonald v. Oregon R. & Nav. Co.,* 233 U.S. 665, 669 (1914).

American Railway Express, supra at 273.

Harkins' argument here is neither novel nor tenable.

Elliott certainly does not concede that any state law precedent was incorrectly applied by the courts below. Under the authorities cited to the courts below, the Mississippi Supreme Court was manifestly correct in construing the subject deed in favor of Elliott and holding that the doctrine of after-acquired title was not applicable. *E.g., McLaurin v. Royalties, Inc.,* 231 Miss. 240, 95 So. 2d 105 (1957); *Crooker v. Hollingsworth,* 210 Miss. 636, 46 So. 2d 541 (1950). However, there is no need to rebut Harkins' argument of state law again in view of the unequivocal prior statements of this Court that such pure applications of state law are not reviewable here. *Agins v. Tiburon,* 447 U.S. 255, 259 n. 6 (1980), and *Patterson v. Colorado ex rel. Attorney General,* 205 U.S. 454, 460-61 (1907).

CONCLUSION

None of the contentions of Harkins in the instant petition for a writ of certiorari are properly raised, and all run counter to the basic concepts of federalism and to that "proper respect for state functions" elucidated by this Court in *Younger v. Harris*, 401 U.S. 37, 44 (1971).

The petition for a writ of certiorari to review the judgment of the Mississippi Supreme Court should be denied.

Respectfully submitted,

JAMES W. ELLIOTT, JR., et al.
By: ALEX A. ALSTON, JR.
(Counsel of Record)
MARY C. HENKEL
THOMAS, PRICE, ALSTON, JONES & DAVIS
519 First National Bank Building
Post Office Drawer 1532
Jackson, Mississippi 39205
Telephone: (601) 948-6882

DONALD B. PATTERSON
Kees Building
Post Office Box 888
Brookhaven, Mississippi 39601
Telephone: (601) 833-7071

JOHN T. ARMSTRONG
ARMSTRONG & HOFFMAN
Post Office Box 190
Hazlehurst, Mississippi 39083

WILLAM E. HATHORN
Post Office Box 759
Prentiss, Mississippi 39474
Counsel for Respondents

APPENDIX

APPENDIX A

(Filed April 6, 1982)

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 53,095

HARKINS AND COMPANY, ET AL
APPELLANTS

VS.

JAMES W. ELLIOTT, JR., ET AL
APPELLEES

APPELLANTS' PETITION FOR REHEARING
(ORAL ARGUMENT REQUESTED)

KENNETH I. FRANKS
GLENN GATES TAYLOR
HEIDELBERG, WOODLIFF & FRANKS
Suite 1030, Capital Towers
Jackson, Mississippi 39201
(601) 948-3800

JOHN E. MILNER
BRUNINI, GRANTHAM, GROWER & HEWES
1400 First National Bank Building
Post Office Drawer 119
Jackson, Mississippi 39205
(601) 948-3101
Attorneys for Appellants

PETITION FOR REHEARING

COMES NOW the Appellants and petition the Court for a rehearing of the decision previously handed down by the panel in this case and for cause would respectfully show that the hearing panel of the Court committed the following errors of fact and law, to-wit:

1.

The panel erred as a matter of law because its decision irreconcilably conflicts with or entirely overrules the existing case law precedents of this Court concerning the application of the doctrine of after-acquired title and effectively nullifies this doctrine.

2.

The panel erred as a matter of law because its decision irreconcilably conflicts with or entirely overrules *sub silentio* the existing case law precedents of this Court concerning the rules of construction which are to be applied to consture instruments of real estate conveyance.

3.

The panel erred as a matter of law by failing to apply the doctrine of after-acquired title to pass Griffith's after-acquired mineral interest to his grantee and Appellants' predecessor-in-title, Robert B. Dale, in satisfaction of his specific grant and warranty of a 9/32nds mineral interest. Its decision is contrary to law and is against the overwhelming weight of the evidence.

4.

The panel erred as a matter of law by failing to apply the rules of construction in interpreting the July 5, 1944

Mineral Right and Royalty Transfer instrument that is the subject of controversy in this case.

5.

The panel erred as a matter of law by affirming the Final Decree of the Chancery Court of Jefferson Davis County.

6.

The panel erred as a matter of law by failing to issue a written opinion addressing the serious and fundamental questions of law concerning the continued viability of the doctrine of after-acquired title and of the rules of construction which apply to construe instruments conveying real property in this State in light of its decision.

In support hereof Appellants submit the accompanying Brief in Support of Petition of Rehearing and respectfully request the opportunity to present oral argument to the Court.

DATED this the 6th day of April, 1982.

Respectfully submitted,

HARKINS AND COMPANY:
ST. JOE PATROLEUM (U.S.) CORPORATION:
FIRST MISSISSIPPI CORPORATION:
JERRY E. ZOBLE:
A. G. HOLZAPEL, Trustee for Mississippi - Alabama Employees Trust No. 2 and Harkins and Company; Employees Profit Sharing Plan No. 1;
H. B. HARKINS;
HARRY W. HAMILTON;
HARRY W. HAMILTON, AGENT;
JAMES R. LESCH;

RAYMOND M. HOLLIDAY;
RAY BUTLER;
FIRST ENERGY CORPORATION;
GRANVILLE G. TUNSTILL;
WARREN DONALDSON;
H. D. LEE; and
TROY ANDERSON
KENNETH I. FRANKS
GLENN GATES TAYLOR
HEIDELBERG, WOODLIFF & FRANKS
Suite 1030, Capital Towers
Jackson, Mississippi 39201
(601) 948-3800
Attorneys for Said Defendants

AMERADA HESS CORPORATION
By /s/ JOHN E. MILNER
EDMUND L. BRUNINI, JR.
JOHN E. MILNER
BRUNINI, GRANTHAM, GROWER & HEWES
1400 First National Bank Building
Jackson, Mississippi 39205
(601) 948-3101
Attorneys for Amerada Hess Corporation, Appellant

JOHN S. DALE;
HAROLD A. DALE;
DAVID B. DALE;
IRENE DALE POLK;
KATHERINE D. LITTLE;
JAMES L. DALE;
ALBERTA D. BAYLIS;
MUNCIE DALE SMITH;
ETHLYN D. TURNAGE,
MARILYN B. MICHAEL;

BEN G. WALDEN, JR.;
BOBBIE W. FOSTER;
M. R. WALDEN, SR.;
MADISON S. DALE;
FRANCES D. PILLOW;
JOSEPH DALE;
BETTY D. TOUCHSTONE;
BESS S. DALE;
SARAH DALE POLK;
ADA DALE GULLEDGE;
MANCIE DALE JOHNSON;
ROBERT M. DALE;
THOMAS D. DALE;
ROBIN DALE FULLER; and
RICHARD S. DALE

JOSEPH DALE
Attorney at Law
Post Office Box 518
Prentiss, Mississippi 39474
(601) 792-5164

Attorney for John S. Dale, et al., Appellants

CERTIFICATE OF SERVICE

I, JOHN E. MILNER, one of the attorneys for Appellants herein, hereby certify that I have this day forwarded a true and correct copy of the above and foregoing Appellants' Petition for Rehearing to:

Donald R. Patterson, Esq.
Post Office Box 888
Brookhaven, Mississippi 39601

Amrstrong & Hoffman
Post Office Box 190
Hazlehurst, Mississippi 39083

William E. Hathorn, Esq.
Post Office Box 759
Prentiss, Mississippi 39474

M. M. Roberts, Esq.
Post Office Box 870
Hattiesburg, Mississippi 39401

Kenneth I. Franks, Esq.
Glenn Gates Taylor, Esq.
Heidelberg, Woodliff & Franks
Suite 1030, Capital Towers
Jackson, Mississippi 39201

M. Ward Bailey, Esq.
24th Floor Continental Life Building
Forth Worth, Texas 76102

Joe Dale, Esq.
Post Office Box 518
Prentiss, Mississippi 39474

This the 6th day of April, 1982.

/s/ JOHN E. MILNER
JOHN E. MILNER

CERTIFICATE OF SERVICE

I, Alex A. Alston, Jr., one of the attorneys for Respondents herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 13th day of December, 1982, I served true and correct copies of the above and foregoing Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi on the parties by mailing three copies of said document by first class mail, postage prepaid, to each of the following persons:

(1) WILLIAM F. COCKRELL, JR., ESQ.
MICHAEL G. KUSHNICK, ESQ.
ROSE, SCHMIDT, DIXON & HASLEY
1575 Eye Street, N.W.
Washington, D.C. 20005

(2) EDMUND L. BRUNINI, JR., ESQ.
JOHN E. MILNER, ESQ.
BRUNINI, GRANTHAM, GROWER & HEWES
1400 First National Bank Building
Post Office Drawer 119
Jackson, Mississippi 39205

(3) KENNETH I. FRANKS, ESQ.
GLENN GATES TAYLOR, ESQ.
HARRY E. NEBLETT, JR., ESQ.
HEIDELBERG, WOODLIFF § FRANKS
Suite 1030, Capital Towers
Jackson, Mississippi 39201

(4) R. FRED HOSEY, ESQ.
HARKINS AND COMPANY
Post Office Box 1940
Alice, Texas 78332

I further certify that all parties required to be served have been served.

ALEX A. ALSTON, JR.

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

No. 82-801

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HARKINS AND COMPANY, *et al.*,
Petitioners,

v.

JAMES W. ELLIOTT, JR., *et al.*,
Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIAM F. COCKRELL, JR.
Counsel of Record

MICHAEL G. KUSHNICK
ROSE, SCHMIDT, DIXON & HASLEY
1575 EYE STREET, N.W.
WASHINGTON, D.C. 20005
(202) 289-8300

EDMUND L. BRUNINI, JR.
JOHN E. MILNER
BRUNINI, GRANTHAM, GROWER & HEWES
1400 First National Bank Bldg.
P.O. Drawer 119
Jackson, Mississippi 39205

KENNETH I. FRANKS
GLENN GATES TAYLOR
HARRY E. NEBLETT, JR.
HEIDELBERG, WOODLIFF & FRANKS
Suite 1030, Capital Towers
Jackson, Mississippi 39201

Counsel for Petitioners

R. FRED HOSEY
HARKINS AND COMPANY
P.O. Box 1940
Alice, Texas 78332
Of Counsel

TABLE OF CONTENTS

		Page
I.	THE FEDERAL QUESTIONS PRESENTED WERE ADEQUATELY RAISED AT THE APPROPRIATE TIME IN THE PROCEEDINGS BELOW	1
	A. Harkins Raised The Federal Questions In A Timely Manner	2
	B. Harkins Raised The Federal Questions In An Adequate Manner	4
II.	ELLIOTT HAS MISCONSTRUED AND DISTORTED HARKINS' CONTENTION THAT THE DUE PROCESS CLAUSE REQUIRED THE MISSISSIPPI COURT SYSTEM TO ISSUE A WRITTEN DECISION ADDRESSING HARKINS' JUDICIAL BIAS CLAIM	7
III.	ELLIOTT HAS DISTORTED CERTAIN OF HARKINS' JUDICIAL BIAS ARGUMENTS WHILE FAILING TO CONTRADICT OTHER OF THOSE ARGUMENTS	8
IV.	ELLIOTT HAS GROSSLY DISTORTED HARKINS' ASSERTION THAT THE DECISION AT ISSUE IS SO ERRONEOUS AS TO CONSTITUTE ARBITRARY AND CAPRICIOUS ACTION	9
APPENDIX		1a

TABLE OF AUTHORITIES

	Page
CASES	
American Railway Exp. Co. v. Kentucky, 273 U.S. 269 (1927)	10
Anders v. California, 386 U.S. 738 (1967)	7
Bessler Movable Stairway Co. v. Bank of Leakesville, 140 Miss. 537, 106 So. 445 (1926)	2
Black v. Washington, 65 Miss. 60, 3 So. 140 (1887)	2
Bryant v. Zimmerman, 278 U.S. 63 (1928)	2,4,6
Colson v. Sims, 220 So.2d 345 (Miss. 1969)	3
Connor v. Finch, 431 U.S. 407 (1977)	6
Crooker v. Hollingsworth, 210 Miss. 636, 46 So.2d 541 (1950)	9
Estate of Briscoe v. Briscoe, 255 So.2d 313 (Miss. 1971)	2
Mathews v. Eldridge, 424 U.S. 319 (1976)	7
McLaurin v. Royalties, Inc., 231 Miss. 240, 95 So.2d 105 (1957)	9
Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980)	2-4,6
Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980)	8
Saunders v. Shaw, 244 U.S. 317 (1917)	3
Silber v. United States, 370 U.S. 717 (1962)	6
Sumner v. Mata, 449 U.S. 539 (1981)	7
Tracy v. Ginzberg, 205 U.S. 170 (1907)	10
United States v. Grinnell Corp., 384 U.S. 563 (1966)	8
Watson v. Kenlick Coal Co., 498 F.2d 1183 (6th Cir. 1974), *cert. denied* 422 U.S. 1012 (1975)	10
Wisdom v. Stegall, 219 Miss. 776, 70 So.2d 43 (1954)	4
Wood v. Strickland, 420 U.S. 308 (1975)	7
PROCEEDINGS BELOW	
Harkins and Company, et al. v. Elliott, et al., No. 53,095 (Miss. Sup. Ct., Mar. 17, 1982), *reh'g denied*, June 30, 1982	*Passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-801

HARKINS AND COMPANY, *et al.*,
Petitioners,

v.

JAMES W. ELLIOTT, JR., *et al.*,
Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Petitioners Harkins and Company, *et al.*, ("Harkins") hereby submit the following Reply to the Brief in Opposition filed by Respondents James W. Elliott, Jr., *et al.*, ("Elliott"):

I. THE FEDERAL QUESTIONS PRESENTED WERE ADEQUATELY RAISED AT THE APPROPRIATE TIME IN THE PROCEEDINGS BELOW.

This Court has consistently held that in order to properly raise a federal question:

> [n]o particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

Bryant v. Zimmerman, 278 U.S. 63, 67 (1928) *quoted in Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 85, n.9 (1980). *Bryant* establishes two key criteria to apply in determining whether a federal question has been properly raised: timeliness and manner of raising.

Elliott has improperly characterized the facts of this case bearing on the timeliness and manner in which Harkins raised the federal questions presented.

A. Harkins Raised The Federal Questions In A Timely Manner.

The first federal question presented is based on remarks by the trial judge ("Statement of Bias") which constituted personal opinions regarding the grantor of a deed (who was a party before the court), the construction of which deed formed the basis of the lawsuit, and of the grantee of that deed, the predecessor-in-interest of another party—opinions based exclusively on extrajudicial sources—opinions crucially relevant to the intentions of the deed's grantor and grantee as to the scope of property which was in fact being conveyed.

Despite the impression conveyed in Elliott's brief (Brief in Opposition at 3, 5), the Statement of Bias was not made at a break or a recess, but was made only *moments before* the trial judge issued his decision in the case. *See* the affidavit of trial counsel for Harkins, attached as Appendix A. Consequently, Harkins had no opportunity to object to the Statement of Bias or to move the trial judge to recuse himself prior to his decision in the case, and the Mississippi cases cited by Elliott (Brief in Opposition, *supra* at 3)[1] to support its contention that Harkins failed to follow proper procedures are not on point.

---

[1] Bessler Movable Stairway Co. v. Bank of Leakesville, 140 Miss. 537, 106 So. 445 (1926), states that objections to evidence must be specific, not general (Harkins' objection to the Statement of Bias was most specifically made); Black v. Washington, 65 Miss. 60, 3 So. 140 (1887) states that an objection must be raised to the trial court (Harkins did so by filing its Bill of Exceptions); Estate of Briscoe v. Briscoe, 255 So. 2d 313 (Miss. 1971) states that allegations of error in a jury trial must be properly raised if they are to be considered on appeal (Harkins properly raised its objection to the Statement of Bias).

This Court addressed an analogous situation in *Saunders v. Shaw*, 244 U.S. 317, 320 (1917) and concluded that "when the act complained of is the act of the . . . court, done unexpectedly at the end of the proceeding, . . . it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way" could not appeal. *See also PruneYard, supra* at 85, n. 9 (1980).

Harkins promptly (within ten days of the trial judge's decision in the case) presented the trial judge with a Bill of Exceptions which noted for the record the Statement of Bias. How can Elliott fairly expect Harkins to have asserted more quickly its objection to the Statement of Bias?

Elliott contends that Harkins should have made a post-hearing motion, presumably for a new trial. However, under Mississippi law in effect at the time, it was not necessary for Harkins to file a motion for new trial. *See Colson v. Sims*, 220 So.2d 345 (Miss. 1969). That Harkins followed proper procedures is evidenced by the fact that the Mississippi Supreme Court accepted as properly made Harkins' appeal from the trial court's decision.

The second federal question presented, whether the Mississippi Supreme Court erred in failing to address, in a written opinion, Harkins' claim that the Statement of Bias was improper, could not possibly have been raised until the Mississippi Supreme Court issued its decision in the case. At that time, Harkins raised that objection by objecting both to the Mississippi Supreme Court's failure to issue a written decision (Brief In Support of Appellants' Petition for Rehearing at 2, *Harkins and Company, et al. v. Elliott, et al.*, No. 53,095 (Miss. Sup. Ct., Mar. 17, 1982), *reh'g denied*, June 30, 1982 ("Brief in Support of Rehearing")) and to the Statement of Bias by the trial judge (*id.* at 11-12).

With respect to the third federal question presented, whether arbitrary and capricious action violating due process had been taken by the Mississippi court system, it was not possible for Harkins fairly to assert that such arbitrary and capricious action had been taken until the Mississippi Supreme Court had elected not to issue a written explanation of the abrupt departure from controlling state precedent for the

construction of deeds. Harkins made such a timely assertion of the arbitrary and capricious action argument in its Brief In Support of Rehearing.

B. Harkins Raised The Federal Questions In An Adequate Manner.

Not only did Harkins timely raise those federal questions, but also it presented them in a manner adequate to satisfy the requirements of this Court. Harkins clearly presented the federal question, whether the trial judge had demonstrated improper bias, in its appeal to the Mississippi Supreme Court, by stating that:

(i) "The Lower Court erred in considering facts known to and personal opinions held by the Chancellor and which were not in evidence," Assignments of Error at 1, *Harkins, supra,* and

(ii) the trial judge "*injected* his *own personal knowledge and opinions* that were not in evidence as a *primary* source of his" conclusions of law, Appellants' Rebuttal Brief at 4-5, *Harkins, supra* (emphasis contained in the original).

Although Harkins did not use *directly* constitutional "buzz words" in making its improper bias argument, it nevertheless clearly stated the gravamen of its constitutional claim. Furthermore, consistent with this Court's holding in *Bryant,* affirmed in *Prune Yard,* that "if the record as a whole shows . . . clear intendment" the "claim of invalidity," then "the claim is to be regarded as having been adequately presented," 278 U.S. at 67, Harkins conveyed its "clear intendment" that the due process clause of the federal constitution constituted the legal basis underlying its contention. Harkins did so, *e.g.,* by (i) relying on a primary case, *Wisdom v. Stegall,* 219 Miss. 776, 70 So.2d 43, 45 (1954), which cited "constitutional right" and "procedural due process" as the legal doctrinal basis for its holding[2] and (ii)

[2] Although the *Stegall* court's opinion cited violations of "procedural due process" and "constitutional right" specifically with reference to the trial judge's refusal to allow the appellants full opportunity to interrogate witnesses to a survey, the making of which formed the basis of the trial judge's impermissible "personal knowledge," it is nevertheless implicitly clear that the court considered the trial judge's consideration of "personal knowledge" to violate "procedural due process" and "constitutional right."

indicating no other legal doctrinal basis for its assertion that the trial judge acted improperly in basing his decision on his personal opinions.[3]

Also, Harkins objected in an adequate manner to the Mississippi Supreme Court's unanticipated failure to issue a written determination. In its Brief In Support of Rehearing, Harkins objected strenuously to the failure to issue a written determination (*id.* at 2) and to the Statement of Bias by the trial judge (*id.* at 11-12).

Similarly, Harkins objected in an adequate manner to the arbitrary and capricious nature of the Mississippi court system's rejection, without explanation, of long standing principles of deed construction consistently applied in Mississippi cases, in circumstances involving judicial bias. When the elements of the claim of arbitrary and capricious action were complete, Harkins stated (in essence) that the decision in the case was arbitrary and capricious, not merely erroneous, as follows:

> The seriousness of the panel's mistake and error in rendering its decision cannot be over-emphasized. With all due respect, either the panel did not appreciate the nature and importance of the after-acquired title doctrine issue involved or it consciously ignored and rejected this Court's body of decisions regarding the interpretation and construction of land conveyance instruments. We actually have no way of knowing how the panel reached its disastrous conclusion since *it issued no written opinion to explain its reasoning.* We respectfully submit that the lower court's decision cannot be affirmed by written opinion without effectively overruling the established decisions of this Court on the construction of deeds.
>
> The need for a written opinion in this case cannot be overstated. At issue are (1) the continued viability of the doctrine of after-acquired title in this State, and (2) the validity of the substantive rules of

[3] Contrary to Elliott's assertion (*see* Brief in Opposition, *supra* at 13), Harkins did not state that the legal principle violated by the trial judge's Statement of Bias was a state evidentiary rule of law.

> construction which this Court and the title lawyers of this State—particularly the oil and gas bar—are to follow in construing land instruments and in determining the ownership of hundreds of millions of dollars in oil and gas production. Has the doctrine of after-acquired title been discarded? The action of the panel leaves us agasp. Have the rules of construction which this Court has followed for almost a hundred years suddenly been changed? Are the rules to be ignored? What are the rules now? We do not know the answers to these questions because we have no written opinion. The title lawyers of this state need to know what the law in this area is, and this case is a "textbook case" for decision by written opinion.

Brief In Support of Rehearing, *supra* at 2 (emphasis contained in the original).

It may be concluded, then, that Elliott is incorrect in distinguishing *Bryant* and *Prune Yard* (Brief In Opposition, *supra* at 3); in the facts presented, as was true in those cases, "there was some showing that the state courts were at least notified that constitutional rights were claimed to be at issue."

Even if, *arguendo,* Harkins did not explicitly raise below the federal questions presented here, it nevertheless would be appropriate for the Court to consider those questions under the "plain error doctrine." This Court has stated that in exceptional circumstances "appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *Silber v. United States,* 370 U.S. 717, 718 (1962). Applying that policy to the facts presented, it should be noted that the "fairness, integrity or public reputation of judicial proceedings" is certainly affected here where substantial allegations of judicial bias and arbitrary and capricious action by an entire court system have been made.

Furthermore, the Court has indicated a greater willingness to apply the plain error doctrine where the raising of federal questions below was at least implied. *See Connor v. Finch,* 431

U.S. 407, 421, n. 19 (1977). Certainly, it must be concluded that in the facts presented Harkins at least implied the raising of the federal questions presented.

II. ELLIOTT HAS MISCONSTRUED AND DISTORTED HARKINS' CONTENTION THAT THE DUE PROCESS CLAUSE REQUIRED THE MISSISSIPPI COURT SYSTEM TO ISSUE A WRITTEN DECISION ADDRESSING HARKINS' JUDICIAL BIAS CLAIM.

The sum and substance of Harkins' contentions with respect to the failure of the Mississippi court system to issue a written opinion addressing Harkins' judicial bias claim is as follows: (i) if a non-frivolous Constitutional claim is raised, *a court, some court,* must issue a written determination responding to that claim. (*See* Petition for a Writ of Certiorari at 5 ("Petition"); *Sumner v. Mata,* 449 U.S. 539 (1981); *Wood v. Strickland,* 420 U.S. 308 (1975); and *Anders v. California,* 386 U.S. 738 (1967)); (ii) although this Court has not *yet* explicitly stated that the failure of a court system to issue such a written determination responding to such a claim constitutes a denial of due process, "nevertheless such a statement would be entirely consistent with the statements which the Court has made," Petition, *supra* at 8-9, and this Court's "precedents indicate that whether the issuance of a written determination by a court is mandatory has depended on the importance of the issue raised." *Id.* at 9.

Unfortunately, Elliott's Brief In Opposition contains gross distortions of Harkins' position and the cases cited in support of that position. For example, Elliott, by mistakenly asserting that Harkins attacks Rule 43(c) of the Rules of the Supreme Court of Mississippi (Brief In Opposition, *supra* at 1), has failed to perceive that Rule 43(c) may be construed so as not to excuse the Mississippi Supreme Court from issuing a written opinion where the judgment of the trial court never addressed the issue raised on appeal. Also, Elliott has completely misconstrued (Brief in Opposition, *supra* at 10-11) the relevance of Harkins' citation of *Mathews v. Eldridge,* 424 U.S. 319 (1976), which was cited, not because of the relevance of its particular facts, or its specific holding, but because it represents a relatively recent

articulation by this Court of the elements of its flexible due process concept. *See* Petition, *supra* at 7-8.

Harkins has due regard for considerations of federalism. A holding by this Court, addressing the exceptional circumstance where a state court system refuses to issue a written determination addressing a claim of deprivation of due process guaranteed by the Constitution, would not constitute an objectionable interference with state courts.

III. ELLIOTT HAS DISTORTED CERTAIN OF HARKINS' JUDICIAL BIAS ARGUMENTS WHILE FAILING TO CONTRADICT OTHER OF THOSE ARGUMENTS.

Elliott has incorrectly stated that the trial judge's Statement of Bias "is completely neutral as to the predecessors of parties on both sides of the litigation" and that the "remark favored neither side." The trial judge's Statement of Bias was not "completely neutral." The trial judge's remark at issue, the Statement of Bias, formed the basis of a conclusion which clearly favored Elliott's "side of the litigation."

Elliott appparently has failed to perceive that a trial judge's predisposition toward the evidence based on extra-judicial contacts constitutes bias and that such bias may be just as objectionable as an explicitly stated desire by a judge to see one party prevail over another party because of the judge's personal liking of one party or personal disliking of another. *See* Petition, *supra* at 14-15.

It is also important to note that Elliott has made no effort to refute the controlling relevance of the analytical test set forth by this Court in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (*see* Petition, *supra* at 14) or of the holding of *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980), which bears such a close factual similarity to the facts of this case (*see* Petition, *supra* at 11-13).

IV. ELLIOTT HAS GROSSLY DISTORTED HARKINS' ASSERTION THAT THE DECISION AT ISSUE IS SO ERRONEOUS AS TO CONSTITUTE ARBITRARY AND CAPRICIOUS ACTION.

Harkins has never contended, as Elliott has suggested (Brief In Opposition, *supra* at 14), that the due process clause guarantees state litigants the benefit of prior state law precedents.

Rather, Harkins has limited its assertion to the well founded proposition that *only* where a state court decision is so clearly erroneous, so completely lacking in rational basis, as to constitute arbitrary and capricious action, is the Constitution's due process guarantee violated. Applying that principle to the facts presented, Harkins has concluded that such arbitrary and capricious action was taken in view of the facts that (i) long standing principles of deed construction consistently applied in Mississippi cases were ignored in this case (ii) by a trial judge who demonstrated improper bias and (iii) no written explanation of why that departure from precedent and that judicial bias was not improper was provided by any court. Elliott has not effectively refuted that conclusion or its underlying bases.[4]

---

[4] With respect to principles of deed construction, Elliott cites two Mississippi cases which are clearly distinguishable. McLaurin v. Royalties, Inc., 231 Miss. 240, 95 So.2d 105 (1957) stated that the after-acquired title doctrine was inapplicable *only* " if the conveyance is merely a quit claim deed and there are no covenants or recitals showing an intention to convey any definite interest or estate." 95 So.2d at 108. The deed at issue here is a Mineral Right and Royalty Transfer Deed which warrants title to an expressed $\frac{9}{32}$'s mineral interest. In Crooker v. Hollingsworth, 210 Miss. 636, 46 So.2d 541 (1950), the court concluded that the after-acquired title doctrine was inapplicable because (i) a third party was the grantee in fact of the after-acquired title; (ii) the party advocating the application of the after-acquired title doctrine was using the doctrine offensively; (iii) the person who sought application of the after-acquired title doctrine had *actual* knowledge of the deficiencies of his grantor's title and (iv) the deed conveyed no specific interest in the property. In this case (i) there were no third party grantees; (ii) Harkins claimed the benefit of the after-acquired title doctrine for defensive purposes; (iii) no actual knowledge by the original grantee of any deficiency in grantor's title has been asserted and (iv) the deed conveyed a *specific estate* ($\frac{9}{32}$'s).

Elliott has missed Harkins' point in citing *American Railway Exp. Co. v. Kentucky*, 273 U.S. 269 (1927) (*see* Brief In Opposition, *supra* at 14-15), which was to invoke the general principle asserted in that case (and also stated in other leading cases, *e.g.*, *Tracy v. Ginzberg*, 205 U.S. 170 (1907)). Surely Elliott does not deny that the "Due Process Clause of the Fourteenth Amendment is not wholly without content for purposes of evaluating the arbitrariness of actions by the State; state . . . [action] may be tested under that Clause against a modest but identifiable standard of minimum rationality."[5]

For these reasons, Elliott's arguments are not persuasive. Accordingly, a writ of certiorari should issue to review the judgment of the Mississippi Supreme Court.

Respectfully submitted,

HARKINS AND COMPANY

WILLIAM F. COCKRELL, JR.
Counsel of Record

MICHAEL G. KUSHNICK
ROSE, SCHMIDT, DIXON & HASLEY
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 289-8300

EDMUND L. BRUNINI, JR.
JOHN E. MILNER
BRUNINI, GRANTHAM, GROWER & HEWES
1400 First National Bank Bldg.
P.O. Drawer 119
Jackson, Mississippi 39205

KENNETH I. FRANKS
GLENN GATES TAYLOR
HARRY E. NEBLETT, JR.
HEIDELBERG, WOODLIFF & FRANKS
Suite 1030, Capital Towers
Jackson, Mississippi 39201

Counsel for Petitioners

R. FRED HOSEY
HARKINS AND COMPANY
P.O. Box 1940
Alice, Texas 78332
Of Counsel

[5] Watson v. Kenlick Coal Co., 498 F.2d 1183 (6th Cir. 1974), *cert. denied* 422 U.S. 1012, 1018 (1975) (Douglas, J., dissenting).

CERTIFICATE OF SERVICE

I, WILLIAM F. COCKRELL, JR., Counsel of Record for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 3rd day of January, 1983, I served copies of the foregoing Reply Brief on the parties by mailing three copies of said document by first class United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

Donald B. Patterson, Esquire
P.O. Box 888
Brookhaven, Mississippi 39601

Armstrong & Hoffman
P.O. Box 190
Hazelhurst, Mississippi 39083

William E. Hathorn, Esquire
P.O. Box 759
Prentiss, Mississippi 39474

S. Wayne Easterling, Esquire
P.O. Box 870
Hattiesburg, Mississippi 39401

Alex A. Alston, Jr., Esquire
519 First National Bank Building
P.O. Drawer 1532
Jackson, Mississippi 39205

M. Ward Bailey, Esquire
24th Floor
Continental Life Building
Fort Worth, Texas 76102

Joe Dale, Esquire
P.O. Box 518
Prentiss, Mississippi 39474

Thomas, Price, Alston, Jones & Davis
519 First National Bank Building
P.O. Drawer 1532
Jackson, Mississippi 39205

M. M. Roberts, Esquire
P.O. Box 870
Hattiesburg, Mississippi 39401

I further certify that all parties required to be served have been served.

William F. Cockrell, Jr.

APPENDIX

APPENDIX A

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HARKINS AND COMPANY, *Et Al.*,
Petitioners

v.

JAMES W. ELLIOTT, JR., *Et Al.*,
Respondents

AFFIDAVIT IN SUPPORT OF PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUPREME COURT OF THE UNITED STATES
STATE OF MISSISSIPPI
COUNTY OF HINDS

Glenn Gates Taylor, being first duly sworn, deposes and says:

1. I am Glenn Gates Taylor and have personal knowledge of the facts set forth herein.

2. I am an attorney and counselor at law with the law firm Heidelberg, Woodliff & Franks, Suite 1030 Capital Towers, Jackson, Mississippi 39201, and was one of several counsel representing Petitioners Harkins and Company, *et al* at the trial of James W. Elliott, *et al.* v. Harkins and Company, *et al.* in the Chancery Court of Jefferson Davis County, Mississippi. I was present in open court on December 8, 1980, at the trial of this matter.

3. On December 8, 1980, Honorable J. W. Walker, Chancellor, the trial judge in this matter, made the following statement from the bench ("Statement of Bias"):

> "I knew both B. C. Griffith and Robert Dale, they weren't anybody's fools, they were good businessmen and knowledgeable about the oil business and would not have put something in the instrument without some reason, unless it meant something."

4. This Statement of Bias was made from the bench only moments before the trial judge rendered his decision and was not rendered at a break in the proceedings or a recess in the trial. This Statement of Bias and the decision rendered by the trial judge occurred, for all practical purposes, simultaneously without opportunity for objection on the part of any counsel in attendance at trial.

s/s GLENN GATES TAYLOR

Glenn Gates Taylor

SWORN TO AND SUBSCRIBED BEFORE ME this the 27th day of December, 1982.

s/s DIANNE GARVIN

Notary Public

My Commission Expires: June 16, 1985
(Seal Affixed)